Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

LAURIE A. WHITE, INDEPENDENT COUNSEL,

Petitioner,

versus

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI FILED ON BEHALF OF INDEPENDENT COUNSEL

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the federal district court has the power and authority to appoint Independent Counsel to investigate and present mitigating evidence during the penalty phase of a capital case in order to protect the public interest in a full, fair and reliable sentencing hearing, pursuant to the mandates of the Eighth and Fourteenth Amendments of the United States Constitution, where the *pro se* defendant refuses to present evidence in mitigation of a death sentence while the government seeks a death sentence.

II.

Whether the role of Independent Counsel, appointed by the court for the sole purpose of investigating and presenting mitigating evidence during a capital sentencing hearing, necessarily infringes upon a *pro se* capital defendant's Sixth Amendment right of self-representation.

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

This is a capital case in which the defendant, Len Davis, was prosecuted by the United States Attorney's Office in the Eastern District of Louisiana. Mr. Davis was sentenced to death. The United States Court of Appeals for the Fifth Circuit reversed his death sentence and remanded for a new sentencing hearing. Mr. Davis is proceeding *pro se* and has represented to the court that he will not present mitigation evidence which virtually assures a death sentence. His expressed goal by procuring a death sentence is to receive closer scrutiny of his conviction. For reasons set forth more fully in this writ, independent counsel was appointed to protect the public interest by presenting mitigation evidence in a full, fair and reliable capital sentencing hearing.

1. Charles R. Fulbridge III, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit
2. Theodore A. Olson, United States Solicitor General
3. Len Davis, Defendant
4. Honorable Helen Ginger Berrigan, Chief Judge, United States District Court – Eastern District of Louisiana
5. Carol Kolinchak, Standby Counsel for Len Davis
6. Julian R. Murray, Jr., Standby Counsel for Len Davis
7. Michael E. McMahon, Assistant U.S. Attorney
8. Stephen Higginson, Assistant U.S. Attorney
9. Laurie A. White, Independent Counsel, Appointed in the Public Interest

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PETITION FOR WRIT OF CERTIORARI

Court appointed Independent Counsel, Laurie A. White, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 11, 2002, to address the important question of federal law presented herein, and to resolve the conflict among the circuit courts on this question.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit which gives rise to this petition is *United States v. Davis*, 285 F.3d 378 (5th Cir. 2002). A copy of the opinion is attached to this petition as Appendix A. The "Order and Reasons" of the United States District Court for the Eastern District of Louisiana appointing Independent Counsel for purposes of presenting mitigation evidence at Len Davis's capital sentencing rehearing is *United States v. Davis*, 180 F.Supp.2d 797 (E.D. La. 2001). This "Order and Reasons" is attached to this petition as Appendix B.

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Fifth Circuit Court of Appeals were filed on March 11, 2002. The Fifth Circuit Court of Appeals denied rehearing on April 25, 2002. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. Proceedings Below

On April 24, 1996, Len Davis and Paul Hardy were convicted of a civil rights murder under 18 U.S.C. §§241 and 242. Following a penalty phase hearing, wherein counsel on behalf of Defendant Davis presented limited

mitigation evidence, both Davis and Hardy were sentenced to death.[1]

On remand to the district court, Davis moved to represent himself during the penalty phase. Initially, the district court granted his request to proceed *pro se*, and appointed stand-by counsel merely to assist him. The district court later reversed itself, when Davis made clear his intent not to present any evidence in mitigation of a death sentence. Rather, Davis would seek a death sentence, acting under the apparent belief that issues raised on appeal and in post-conviction proceedings regarding his underlying convictions will be given greater consideration by reviewing courts if he is under a sentence of death rather than life.

Davis filed a writ of mandamus with the Fifth Circuit Court of Appeals challenging the district court's order appointing independent counsel. The Fifth Circuit reversed the district court, finding that Davis had a Sixth Amendment right to proceed *pro se* on re-sentencing. The district court again granted his motion to proceed *pro se* and appointed stand-by counsel solely to assist Davis should the need arise.

Davis continued to insist that he would present no mitigating evidence during his penalty phase trial, a strategy which previously resulted in a death sentence at his initial trial. The district court had grave concerns that the penalty phase would become one in which the government and the defendant joined hands in asking for a death

[1] Defendant Causey was also tried with Davis and Hardy. He received a life sentence for his convictions.

sentence. The court found that this situation posed an affront to the adversarial system of justice and undermined the public interest in a full, fair and reliable capital sentencing hearing. Accordingly, the district court appointed independent counsel for the sole purpose of investigating and presenting evidence in mitigation of a death sentence, and arguing in favor of life.

Davis, along with the government, opposed appointment of independent counsel, and sought review with the Fifth Circuit Court of Appeals. The Fifth Circuit again reversed the district court's order, finding that the district court lacked the authority to appoint independent counsel, and further that the appointment of independent counsel violated the defendant's Sixth Amendment right to self-representation. Independent counsel filed a petition for rehearing, which was initially denied for lack of standing. Counsel then filed a motion for leave to file for rehearing, which was granted. However, rehearing was subsequently denied.

Independent counsel now seeks review from this Honorable Court, to determine whether the district court has the authority to appoint independent counsel to protect the public's interest in a full, fair and reliable sentencing hearing in this capital case. Counsel also requests that this court issue an opinion as to whether a *pro se* capital defendant's Sixth Amendment rights are necessarily violated when the court appoints independent counsel for the sole purpose of presenting mitigation evidence during the penalty phase trial.

B. Statement of Relevant Facts and Opinions

On October 13, 1994, Kim Groves was shot and killed while standing outside her New Orleans residence. The government introduced evidence at trial that Defendant Len Davis, then a New Orleans Police Officer, had recruited co-defendants Hardy and Causey to kill Groves because she had filed a police brutality complaint against Davis with the Internal Affairs Division of the New Orleans Police Department. Defendants Davis and Hardy were convicted of violating 18 U.S.C. §241, conspiracy against civil rights, 18 U.S.C. §242 deprivation of rights under color of law, and 18 U.S.C. §1512(a)(1)(c), witness tampering. Following a joint penalty phase hearing, in which Davis's counsel offered very limited evidence in mitigation of a death sentence, Davis and Hardy were sentenced to death.

In *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999), cert. denied sub nom. *U.S. v. Davis*, 530 U.S. 1277, 120 S.Ct. 2747 (2000), the U.S. Court of Appeals for the Fifth Circuit reversed Davis' and Hardy's death sentences and ordered the case remanded for a new sentencing hearing. On remand, the co-defendants' cases were severed.

Davis then moved to represent himself during the penalty phase proceedings of this capital case. The court granted his motion, and appointed stand-by counsel to assist. Thereafter, Davis made clear that he intended, once again, to forgo the presentation of mitigating evidence during the penalty phase rehearing with the expectation that he would receive a death sentence, which would allow for closer scrutiny of his conviction. Based upon Davis's representations, the district court revoked

his self-representation request and ordered stand-by counsel to assume full control over the defense, including the investigation and presentation of mitigation evidence. The court reasoned that, under these limited and unusual circumstances, the public interest in a fair and reliable death sentence determination overrode Davis's right to self-representation under *Farretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Davis sought review of the district court's denial of his request to proceed *pro se*. The Fifth Circuit held that Davis had a Sixth Amendment right to represent himself during the penalty phase. On direction of the Fifth Circuit, the district court once again granted Davis' motion to proceed *pro se*, and appointed stand-by counsel to assist him.

Throughout the pre-sentencing hearing proceedings, Davis has made clear, in pleadings and in open court, that he does not intend to present evidence in mitigation of a death sentence, other than residual doubt.[2] Davis insists that he is not on a "suicide mission," but rather that he seeks a death sentence as a post-conviction strategy.

At times Davis has evidenced his intent not only to withhold mitigation evidence, but to actually sabotage his defense at the penalty phase by engaging in a form of civil disobedience. During a July 26, 2001, status hearing, Davis

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[2] It is important to note that never has there been a thorough psycho-social history conducted in this case regarding Len Davis. Therefore, there is no way to know if his decisions are being dictated by information that he does not want uncovered or presented which would be relevant in mitigation.

challenged the court to either conduct the proceedings according to his dictates, or he would effectively shut down the process. He stated:

> [I]f this case doesn't go forward on August 13th [2001] . . . I am coming in this courtroom and there will be no residual doubt argument, there will be no cross examination, there will be no opening and closing statements, and I have already made it clear that I'm wearing just what I'm wearing [(a prison jumpsuit)].
>
> . . . [I]'ll come in this courtroom, sit down with no problems, and will do absolutely nothing if this case doesn't go forward.

See *United States v. Davis*, 285 F.3d 378, 386, n.2. (Dennis, J., dissenting).[3]

Consequently, on August 30, 2001, the district court appointed independent counsel "to represent the public interest in a full and fair penalty phase. . . . " Appendix B. The court noted that the public "has a substantial independent interest in being assured of a full and fair sentencing proceeding, in compliance with constitutional and statutory requirements, so that the death penalty is not imposed arbitrarily and capriciously." *Id.* at 2. The court found that the mandates of the Eighth and Fourteenth Amendments require the presentation of both aggravating and mitigating facts to the jury. By appointing independent counsel, the district court sought to enhance the

[3] Clearly, such trial "strategy," if done by counsel, would constitute ineffective assistance of counsel.

integrity of the adversarial system, and the reliability of sentencing procedures in this capital case.

As defined in the district court's order, independent counsel's limited mandate was "to investigate and present mitigating evidence at the penalty phase." *Id.* at 2. The district court further specified that independent counsel "will be clearly identified as *not* representing Davis, and Davis will be permitted to present whatever defense he deems appropriate on his own behalf." *Id.* (emphasis in original). The district court went to great measures to insure that Davis' right of self-representation remains intact:

> This Court, of course, will abide by [the Fifth Circuit's] decision and allow Davis full rein in his penalty phase. He may voir dire jurors, make an opening statement, question witnesses, call witnesses, introduce evidence, make objections and present a closing argument, all as he desires to do or not do, within the appropriate procedural and evidentiary rules.

Id. at 6.

On October 9, 2001, Davis filed a "Motion for Clarification of Court's Issuance of Writ of Mandamus, Second Writ to District Court." On March 11, 2002, the Fifth Circuit reversed the district court's order appointing independent counsel, finding that a defendant's Sixth Amendment right to represent himself during the penalty phase of a capital case outweighed the district court's authority to appoint *amicus* counsel. The Fifth Circuit did not discuss any of the Eighth and Fourteenth Amendment considerations raised by the district court's order and reasons. Rather, the opinion focused entirely upon both

the lower court's lack of authority to appoint independent counsel and the apparently unassailable "strength and nature" of a defendant's right to self-representation. See *United States v. Davis*, 285 F.3d 378 (5th Cir. 2002).

In a vigorous dissent, Judge Dennis took issue with the majority's reasoning and the focus of the opinion. At the outset, he rephrased the primary issue as whether a "*convicted capital murder defendant* has the absolute right to choose death as a penalty and thus turn his sentencing hearing under the Federal Death Penalty Act of 1994 ("FDPA") into a charade." *Id.*, at 385 (Dennis, J. dissenting) (emphasis added). Judge Dennis disagreed with the Fifth Circuit's interpretation of this Court's cases in holding that an accused has "an absolute right to self-representation, and that the trial court is therefore powerless to exercise any significant supervision or regulation of the defendant's use of that right." *Id.* at 386.

Independent counsel now seeks review from this Honorable Court, to determine whether a federal district court has the authority to appoint independent counsel to protect the public interest in a full, fair and reliable capital sentencing determination, where the *pro se* defendant refuses to present evidence in mitigation of a death sentence.

Independent counsel also seeks this Honorable Court's guidance to determine whether the role of independent counsel, appointed by the court for the sole purpose of investigating and presenting mitigating evidence during a capital sentencing hearing, necessarily infringes upon a *pro se* capital defendant's Sixth Amendment right of self-representation.

REASONS FOR GRANTING THE PETITION

I. This Court should grant *certiorari* because the Fifth Circuit's conclusion that a federal district court lacks the authority to appoint independent counsel for purposes of presenting mitigation evidence during a capital sentencing hearing where the *pro se* defendant chooses not to offer evidence in mitigation of a death sentence, is irreconcilably in conflict with this Court's decisions, with federal statutes, and with decisions of the United States Court of Appeals for the Seventh Circuit.

This case presents this Court with an opportunity to clarify the nature and limits of the federal district courts' authority to take steps to ensure that the FDPA of 1994 is applied according to the dictates of the constitution. While there are ample analogous examples of the exercise of judicial power as seen in this case, under these specific facts, this is largely a case of first impression for this Court.

A. The district court has the power and authority to appoint independent counsel to investigate and present mitigating evidence, in order to protect the public interest in a full, fair and reliable capital sentencing determination, where the *pro se* defendant will actively seek a death sentence.

The Fifth Circuit's opinion, finding that the district court does not have the power or authority to appoint independent counsel to ensure that the adversarial nature of the capital sentencing process is secure, ignores long

standing principals set forth by this Court. In *United States v. Nixon*, this Court explained:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts within the framework of the rules of evidence.

United States v. Nixon, 418 U.S. 683, 709 (1974). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975).

The need for an effective adversarial process is not confined to issues only of guilt and innocence. This Court has also recognized the importance of opposing views in capital sentencing considerations, reversing a death sentence that was imposed on the basis of one-sided information that had not been subjected to debate through the adversarial process. In *Gardner v. Florida*, this Court stated:

> [T]he argument rests on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief [is] that debate between adversaries is often essential to the truth-seeking function of trials[.]

Gardner v. Florida, 430 U.S. 349, 360 (1976). "A capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial – to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Landford v. Idaho*, 500 U.S. 110, 127, 111 S.Ct. 1723, 1733, 114 L.Ed.2d 173 (1991) (quoting *Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

This Court has not supported the position that federal district courts must play a passive role in the administration of justice, particularly when faced with a defendant who in every way seeks to subvert the trial process. "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia v. United States*, 289 U.S. 466, 469, 53 S.Ct. 698, 698-99, 77 L.Ed.2d 1321 (1933).

Accordingly, "'guided by considerations of justice' and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress . . . to preserve judicial integrity by ensuring that a conviction [or sentence] rests on appropriate considerations validly before the jury." *United States v. Hastings*, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983) (citing *McNabb v. United States*, 318 U.S. 332, 341, 345, 63 S.Ct. 608, 613, 615, 87 L.Ed.2d 819 (1943)).

Based upon the holdings of this Court, the Fifth Circuit erred in finding that, because there is no specific statute or pronouncement from this Court directly authorizing the appointment of independent counsel, that the

district court did not in fact have the power to do so. The Fifth Circuit has ignored numerous analogous situations in which federal courts have exercised their authority to ensure the fair administration of justice, often in the absence of a specific statute or finding of this Court, granting this power.

B. The district court's order appointing independent counsel is analogous to appointments that are explicitly authorized.

There is federal statutory support for the district court's power to appoint independent counsel to present evidence in mitigation of a death sentence under these circumstances. The Federal Death Penalty Act (FDPA) of 1994 sets forth specific procedures for realizing the basic constitutional requirement that both aggravating and mitigating evidence must be considered by the sentencing jury. These procedures include the requirement of a "special hearing to determine whether a sentence of death is justified." 18 U.S.C. §3593. Under the FDPA, the jury must be permitted to consider any mitigating circumstance. This "special hearing" is mandatory and cannot be waived:

> If the attorney for the government has filed a notice [seeking the death penalty] as required under subsection (a) and the defendant is found guilty of or pleads guilty to an offense described in section 3591, the judge . . . *shall* conduct a separate sentencing hearing to determine the punishment to be imposed.

18 U.S.C. §3593(b) (emphasis added).

Therefore, the FDPA sentencing scheme clearly contemplates that the manner in which the mandatory procedures will occur is through the consideration of mitigating evidence via the adversary system. This requirement under the FDPA reflects this Court's long-standing recognition of the fact that consideration of mitigating evidence through the adversary process is crucial to the overall goal that capital sentencing not occur in an arbitrary and capricious manner.

Additionally, the district court's appointment of independent counsel for the purpose of presenting an essential voice that would otherwise not be heard is entirely consistent with the practice of this Court, the federal appellate courts and the federal district courts, where *amicus curiae* have routinely been appointed specifically so that the adversarial nature of the proceedings may be preserved. "[F]ederal courts have frequently appointed amici to participate in oral argument where neither side will defend an important position." *Dickerson v. United States*, 166 F.3d 667, 681 n.14 (4th Cir. 1999), *rev'd by Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). *See, e.g., Dickerson v. United States*, 528 U.S. 1045, 120 S.Ct. 578, 145 L.Ed.2d 481 (1999) (inviting private party to brief and participate in oral argument in light of government's decision not to defend lower court ruling); *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 1609, 140 L.Ed.2d 828 (1998) (same); *United States v. Hammer*, 226 F.3d 229, 231 (3rd Cir. 2000) (counsel appointed to brief whether the appeal under the Federal Death Penalty statute may be waived

by a competent defendant.");[4] *Altizer v. Deeds*, 191 F.3d 540, 543 n.7 (4th Cir. 1999) (court appointed amicus counsel to proceed after plaintiff terminated his representation and conferred on amicus essentially the same status of a party as the court determined it would benefit by an adversarial presentation of issues); *United States v. Chagra*, 701 F.2d 354, 366 (5th Cir. 1983) (appointing amicus to ensure that the appeal continued to be presented in an adversary context).

The district court's appointment of independent counsel to investigate and present mitigating evidence to the sentencing body in this capital case is similar to a district court's directive to a probation officer to investigate and present relevant information to the sentencing judge prior to the determination of sentence. In the non-capital sentencing context, a probation officer, acting for the district court, typically must conduct a presentence

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[4] The Third Circuit held that a competent defendant may waive appellate review of his death sentence. *Hammer* is the only example where a presumption of a convictions correctness adheres to a conviction and sentence with the appellant bearing the burden of establishing otherwise. The district court's order in this case, however, is intended to ensure the correctness of the jury's ultimate determination. Indeed, Hammer was sentenced to death by a jury that heard fifteen days of testimony and argument relating to sentencing. *United States v. Hammer*, 25 F.Supp.2d 518, 519 (M.D. Pa. 1998). The Third Circuit's conclusion in *Hammer* that neither the FDPA, nor the Constitution, mandates appellate review of death sentences places that court at odds with the practice of all but one death penalty state. *See State v. Robbins*, 5 S.W.2d 51, 57 n.3 (Ark. 1999) (adopting judicially created rule of mandatory review of death sentences and noting that, with its decision, only South Carolina does not require such review). Hammer, who continuously waffled about whether to relinquish his appellate rights, is now seeking collateral review of his conviction and death sentence.

investigation and submit a sentencing report which must include information about the defendant's history and characteristics and any circumstances that affect the defendant's behavior, which should be helpful in imposing sentence. Fed.R.Crim.P. Rule 32(b)(1) and (b)(4)(A). The presentence report is an integral part of the sentencing process, and in the preparing of the report the probation officer acts at the direction of the court. *Spaulding v. Nielsen*, 599 F.2d 728, 729 (5th Cir. 1979). The information required to be set forth in the non-capital presentence report is in substance the same as that which is typically presented in the penalty phase of a capital trial through the adversary process.

Finally, under Fed.R.Evid. Rule 706, a district court is authorized to appoint expert witnesses and may call these experts at trial. As the Advisory Committee Notes to this rule states, "[t]he inherent power of a trial judge to appoint an expert of [her] own choosing is virtually unquestioned." *See also* Fed.R.Evid. Rule 614(a) ("[t]he court may, on its own motion . . . call witnesses, and all parties are entitled to cross-examine witnesses thus called."). The appointment of independent counsel to investigate and present mitigating evidence represents a far more efficient method of ensuring that the sentencing jury has the benefit of this information than would the court's clearly authorized appointment of a mitigation specialist to develop the evidence and the court's clearly authorized calling and questioning of witnesses discovered through the investigation.

Thus, as the examples discussed above demonstrate, there is ample support for the proposition that federal district courts have the authority to appoint counsel in order to protect the public interest and preserve the integrity of our adversarial system of justice. This is

particularly true in the capital sentencing context, where the societal need for a fair and reliable sentencing determination is heightened.

C. The Fifth Circuit's opinion in the instant matter is in conflict with the holding of the Seventh Circuit Court of Appeals.

In *United States v. Taylor*, the Seventh Circuit struggled with the tension between a defendant's Sixth Amendment right of self-representation, and the requirements of the Eighth and Fourteenth Amendments in a reliable capital sentencing determination. There, a *pro se* defendant was assisted by stand-by counsel during the trial of his capital case. However, "standby" counsel was also charged with "the additional responsibility of seeing to it that all facts favorable to the defendant would be brought to trial." *United States v. Taylor*, 569 F.2d 448 (7th Cir. 1978). Though the defendant in Taylor was not restricted from presenting his defense, neither was stand-by counsel. The defendant maintained his objection to counsel's participation throughout the trial. Finding no *Farretta* violation, the Seventh Circuit stated:

> We recognize that *Farretta* holds that an accused has a constitutional right to dispense with the assistance of counsel and to conduct his defense personally. *It does not inevitably follow, however, that this right of self-representation comprehends any correlative right to preclude the trial court from appointing counsel and authorizing him to participate in the trial over the accused's objection in order to protect the public interest in the fairness and integrity of the proceedings.* [FN2]
>
> FN2. As Mr. Chief Justice Burger noted in *Mayberry v. Pennsylvania*, 400 U.S.

455, 467-68, 91 S.Ct. 499, 506, 27 L.Ed.2d 532 (1971) (concurring opinion),

> "When a defendant refuses counsel . . . or seeks to discharge him, a trial judge is well advised as so many do to have such 'standby counsel' to perform all the services a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence and making closing argument. No circumstance that comes to mind allows an accused to interfere with the *absolute right of the trial judge to have such 'standby counsel'* to protect the rights of accused persons' foolishly trying to defend themselves as Mr. Justice Douglas so aptly described it. *In every trial there is more at stake than just the interests of the accused; the integrity of the process warrants a trial judge's exercising his discretion to have counsel participate in the defense, even when rejected. A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself.*"

* * *

In view of the Farretta Court's approving citation of *United States v. Dougherty*, 154 U.S. App. D.C. 76, 87-89, 473 F.2d 1113, 1124-26 (1972), it is not at all clear the Court meant that appointed counsel was constitutionally relegated to only a "standby" role. In *Dougherty*, after all, the District

> of Columbia Circuit had expressly approved of appointed counsel's serving both as a "standby" adviser to a *pro se* defendant and as a friend of the court authorized to act independently of the accused in order to protect his rights in the interests of justice. See 154 U.S. App. D.C. at 88 & nn.18-19, 473 F.2d at 1125 & nn.18-19.

United States v. Taylor, 569 F.2d at 425 & FN2. (emphasis added).

There is now a conflict between the federal circuit courts, as the Seventh Circuit has addressed a nearly identical issue as in this matter, and determined that a defendant's Sixth Amendment right of self-representation is not absolute. Rather, the Seventh Circuit has recognized the courts' authority to appoint "standby" counsel, who actively participates in the trial process, in order to ensure the proper administration of justice.[5] This Honorable Court should grant certiorari in order to resolve the conflict between the federal circuit courts.

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[5] In the instant matter, the district court's appointment of independent counsel was far less intrusive upon the defendant's Sixth Amendment right to represent himself than the appointment of "standby" counsel approved of by the Seventh Circuit. In this case, the district judge made clear that Independent Counsel would not be presented to the jury as an agent of the defense, but rather as an officer of the court whose participation in the process was required as a matter of law.

II. This Court should grant *certiorari* because the opinion of the Fifth Circuit Court of Appeals that a defendant's Sixth Amendment right of self-representation is absolute, and overrides this Court's interpretations of the Eighth and Fourteenth Amendments requirements for reliability in capital sentencing hearings, thus presenting an important and unsettled question of Constitutional law.

Reaching the conclusion that *Faretta* precluded the district court's appointment of independent counsel, the district court held that Davis' Sixth Amendment right to counsel "outweighs an individual judge's limited discretion to appoint amicus counsel when that appointment will yield a presentation to the jury that directly contradicts the approach undertaken by the defendant." App. A. Whether that opinion struck the proper balance between the individual's right to counsel of his choice and society's need for a fair and accurate adjudication of the defendant's sentence presents a significant constitutional issue on which substantial disagreement exists. Before further disagreement and thus further confusion is created in the lower courts, this Court should agree to resolve this dispute through the instant case.

A. Denying the trial court discretion to appoint independent counsel in this capital case precludes the imposition of a fair and accurate capital sentencing determination.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court recognized that an unrepresented defendant in a criminal action "requires the guiding hand of counsel at every step in the proceedings against him. Without it,

though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Id.* at 345. The philosophy embodied in this holding goes further than simply the protection of the innocent from guilty verdicts – it also comprehends the nature and scope of society's right to an adversarial presentation of the evidence at issue so as to insure a more accurate verdict and sentence. "Thus a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). *See also, Id.* ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results"); *U.S. v. Cronic*, 466 U.S. 648, 656 (1984) ("Thus, the adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate"); *Anders v. California*, 386 U.S. 738 (1967). Absent the presentation of divergent perspectives on the evidence and law applicable to the facts of an individual defendant's case, the presence of a single and ringing indictment exacerbates the possibility that "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). Prevention of such a result requires diligent adherence to the presumption that assistance of an attorney is necessary at all critical stages of a criminal proceeding.

Weighed against that omnipresent need for effective assistance of counsel is the defendant's right, recognized by this Court in *Faretta*, "to conduct his own defense" and to decline the assistance of counsel. *Faretta*, 422 U.S. at 836. Though self-representation is part of the Sixth

Amendment right to counsel, the limited right recognized in *Faretta* is not absolute, and may give way to the requirement of "proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country." *Illinois v. Allen*, 397 U.S. 337, 343 (1970). This Court has previously limited the *Faretta* right where the defendant's antics in the courtroom have prevented the orderly conduct of the proceeding. *Id.* It has further recognized that, even where a defendant properly invokes the right of self-representation and does conduct his own trial, the "trial judge may also terminate self-representation or appoint standby counsel – even over the defendant's objection – if necessary." *Martinez v. Court of Appeals*, 528 U.S. 152, 162 (2000). The "necessity" of appointing standby or independent counsel may derive from the defendant's conduct, or from some other intrinsic aspect of self-representation that prevents the court from conducting its business in an orderly fashion.

Necessary in the trial of an accused defendant, the need for representation by counsel becomes all the more acute once a capital defendant has been convicted and must undergo sentencing. This Court has previously observed its "longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." *Saffle v. Parks*, 494 U.S. 484, 493 (1990). It is likewise well-settled that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1976). Statutory schemes failing to take into account all factors relevant to a determination of the appropriateness of the death penalty have been found to violate the Constitution. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 303-304 (1976). Although the need for accuracy benefits the capital

defendant and certainly takes into account his rights, the true motivating factor for requiring consideration of any mitigating factors in a capital case is a civilized society's profound interest in insuring that the death penalty is fairly imposed:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> This Court has previously recognized that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for

> humanity underlying the Eighth Amendment, requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Id. at 304. It would indeed be an odd rule that would rigorously demand the inclusion of statutory mitigating factors in a capital sentencing procedure but then cast a blind eye to a defendant who wished to ignore those factors to the detriment of the process they were designed to protect.

Yet that is precisely what the Fifth Circuit has done in the instant matter. In this case, the Fifth Circuit refused the teachings of *Allen*, *Martinez* and *McKaskle* in favor of an absolutist view of the *Faretta* right to self-representation. The appellate court held that the individual's Sixth Amendment rights are personal and that a capital defendant has a right to decline counsel, without regard to "whether society would benefit from having a different presentation of the evidence." App. A. In so doing it assumes that the defendant in a capital sentencing procedure is the sole relevant actor and that those prosecuting him, those jurors charged with the responsibility of making a sentencing determination and the judge charged with overseeing the proceedings are irrelevant, helpless non-entities. Thus, the Fifth Circuit opinion ignores the conflict between the Sixth Amendment right to self-representation, the Eighth Amendment right prohibiting the imposition of arbitrary and capricious sentences, and the generalized societal concern against wrongfully sentencing someone to death by simply pretending that the latter two concerns do not exist and cannot in any way

interfere with the right to self-representation. This Court's prior jurisprudence demonstrates the opposite.

B. The Fifth Circuit decision highlights a recurring problem requiring attention.

The result of the Fifth Circuit decision, for the instant case and all cases seeking to follow it, will be devastating to the judicial system. Absent independent counsel presenting mitigating evidence and representing the court, the only voice that will be heard in the sentencing proceeding now scheduled in this matter is that demanding death. Both the prosecution and the defendant in this matter have indicated an intention not to present evidence of mitigation and thus both sides will join in asking the jury to recommend the death penalty for Len Davis. Thus, there will be no consideration of whether individual characteristics of Len Davis militate against the imposition of the death penalty. There will be no consideration of whether or not any societal interests will be served by imposing a death sentence as opposed to a sentence of life imprisonment. And there will be no voice in the courtroom insuring that the sentence is imposed in a manner consistent with extant law and logic. Consequently, the defendant in this matter will be able to manipulate the judicial system in such a manner as to foreordain the death sentence to be applied, without any consideration of whether or not there exists any legally or socially sustainable basis for that sentence.

The time is ripe for this Court to answer the question of whether a trial court can appoint independent counsel where a capital defendant wishes to act *pro se* and demand a sentence of death. The case with which the Fifth Circuit decision conflicts, *Taylor v. Illinois*, was decided some sixteen (16) years hence. Thus, the federal and state courts

have had ample time within which to ponder the questions presented by this writ and to develop some doctrinal method for handling the conflict between the *Faretta* right to self-representation and society's demand that a death sentence not be imposed arbitrarily and capriciously. Yet the courts have never fully resolved the question. In the only two (2) circuit cases previously discussed in this matter – *Taylor* and the instant case – the circuit courts reached divergent results. In the state cases cited by the dissent in the instant matter, the state courts reached decisions contradictory to the instant matter, yet the court in this case refused to follow the courts trod by those decisions. *See,* App. A. *See also, State v. Dodd*, 838 P.2d 86 (Wash. 1992); *Klokoc v. State*, 589 So.2d 219 (Fla. 1991); *State v. Koedaitch*, 548 A.2d 939, 992 (N.J. 1988). Thus, the lower courts have failed to reach a consensus as to the discretion afforded a trial court in appointing counsel to represent society's interest in an accurate sentencing procedure. That failure triggers the need for this Court's supervision.

If this Court fails to answer this question now, confusion over this matter will recur, with varying results in the courts faced with the dilemma. As Judge Dennis noted in his dissenting opinion in this matter, passage of the Federal Death Penalty Act will increase the number of defendants facing potential death sentences. *See,* App. A, n. 55. In the Seventh Circuit and in Indiana, Washington, and New Jersey, society's interest in preventing the arbitrary and capricious imposition of the death penalty is protected by the appointment of independent counsel where a *pro se* defendant actively seeks the death penalty. In the Fifth and possibly Fourth Circuits, as well as in the State of Florida, no such protection exists. *U.S. v. Moussaoui*, Crim. No. 01-455-A (E.D.Va. 2002); *Wuornos v. Fla.*, 2002 Fla. LEXIS 752 (Fl. 4/1/02). Before the prosecution of

crimes under the FDPA increases the number of instances in which this issue arises, and thus exacerbates the inconsistent answers currently responsive to it, this Court should grant certiorari to resolve the dispute in this case.

III. This Court should grant *certiorari* because the opinion of the Fifth Circuit Court of Appeals will have substantial ramifications upon state court decisions involving the tension between the right of self-representation and the Constitutional requirements of a fair and reliable Capital sentencing determination.

Although the specific issue addressed by the Fifth Circuit in this matter related to the right of a defendant to self-representation in an FDPA case, the ramifications of that decision reach to both federal and state cases. The holding reached by the Fifth Circuit – to the effect that a defendant's *Faretta* rights preclude the appointment of independent counsel in virtually all circumstances where the defendant wishes to act *pro se* – relied on the Sixth Amendment right to counsel and this Court's *Faretta* decision as its essential underpinning. To the extent that state courts follow this as an authoritative interpretation of the Sixth Amendment, they will be reluctant to appoint independent counsel in similar situations. This produces results at odds with this Court's *McKaskle v. Wiggins,* 465 U.S. 168, 176 (1984) and *Martinez* decisions. It will further cause a shift towards less selective imposition of the death penalty in a manner inconsistent with contemporary societal values and the mandates of the Eighth and Fourteenth Amendments.

Resting primarily on the history of the right of self-representation, the *Faretta* court announced a rule that

the Sixth Amendment right to counsel included the right to refuse counsel. Yet, as this Court noted in *Martinez, supra*, "the original reasons for protecting that right do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need – although not always the desire – for self-representation." *Martinez*, 528 U.S. at 158. That narrowing of the *Faretta* holding followed the prior holding of this Court in *McKaskle, supra*, to the effect that a defendant must accept aid "from the plural voices speaking for the defense in a trial of more than one defendant, or from an *amicus* counsel appointed to assist the court." *McKaskle*, at 177. Because the "government's interest in ensuring the integrity and efficiency of the trial" is particularly acute in the capital sentencing context, *compare Martinez,* 528 U.S. at 158 with *Woodson*, 428 U.S. at 304, the obligation of a defendant to accept such aid becomes all the more necessary in a death penalty case.

Yet the Fifth Circuit has interpreted *Faretta* in a far broader manner and has recognized a virtually absolute Sixth Amendment right of a capital defendant, not only to refuse the assistance of standby counsel, but also to prevent the district court from appointing independent counsel to represent the public interests in a reliable capital sentencing determination. It has grounded that holding of its interpretation of the Sixth Amendment right to counsel, a right equally applicable to state proceedings through operation of the Fourteenth Amendment. *See generally, Gideon*, 372 U.S. at 344. Thus, the holding reaches beyond the narrow statutory grounds surrounding procedure in federal death penalty cases and has instead announced a broad constitutional rule interpreting the Sixth Amendment to the United States Constitution. Such

a decision invites state courts to adopt this constitutional rule and to apply it to state court proceedings involving similar circumstances. The ramifications of such an adoption are substantial and detrimental to the criminal justice system.

Not only has the Fifth Circuit decision expanded the right to counsel, it has further announced a rule that any Eighth Amendment requirement that a jury consider mitigation evidence may be waived if the defendant does not wish to present such evidence and instead demands a death sentence. This decision conflicts with *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), in which the Florida Supreme Court held that "if the trial court prefers that counsel present mitigation rather than calling its own witnesses, the trial court possesses the discretion to appoint counsel to present the mitigation." *Id.* at 363. Accord, *Klokoc v. State,* 589 So.2d 219 (Fla. 1991). It is further at odds with the rationale of the decisions reached by the Washington and New Jersey courts in *State v. Dodd*, 838 P.2d 86 (Wash. 1992) and *State v. Koedaitch*, 548 A.2d 939, 992 (N.J. 1988), both of which permitted the use of *amicus* counsel to provide necessary evidence in mitigation where a capital defendant refused to do so. If subsequent courts in these states choose to follow the instant case then they will abrogate the holdings of these cases in the future and adopt the rule of *Davis*. Otherwise, they may adhere to the original rules they laid down while refusing to follow the holding of *Davis*. Either way, the instant decision creates a situation of intractable tension between prior decisions interpreting *Faretta* and the Fifth Circuit holding that *Faretta* provides an absolute right to waive evidence of mitigation and demand a death sentence in a capital proceeding.

If adopted, the rule of the instant case will permit state courts to ignore the need to consider evidence in mitigation of a death sentence, for it will lead those courts to assume that the need for such evidence is not mandatory and may be waived. Thus, the decision will permit a return to a pre-*Gregg* regime in which relevant mitigating factors are not considered in a capital sentencing hearing. Compare, *Gregg v. Georgia*, 428 U.S. 153, 189-190 (1976) with *Atkins v. Va.*, 00-8452, ___ U.S. ___, 122 S.Ct. 2242 (2002). Prevention of this result requires this Court's review of the instant case.

CONCLUSION

Wherefore, the foregoing reasons considered, this Court is respectfully urged to grant Independent Counsel's petition for a writ of *certiorari*.

New Orleans, Louisiana, this 24th day of July, 2002.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30656

CR 94-381 C

UNITED STATES OF AMERICA,
Plaintiff-Appellee

VERSUS

LEN DAVIS,
Defendant-Appellant

Petition for Writ of Mandamus to the United States — District Court for the Eastern District of Louisiana.

(Filed Mar. 12, 2002)

Before DeMOSS, PARKER and DENNIS, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

The Defendant-Petitioner, Len Davis ("Davis"), has filed a motion for clarification of this Court's previous writ of mandamus, or, alternatively, for the issuance of a second writ of mandamus overturning the district court's decision to appoint an independent counsel to represent the public interest in the penalty phase proceeding of this capital case. For the following reasons, we issue the writ.

I. FACTS AND PROCEDURAL HISTORY

Davis was convicted of civil rights murder in violation of 18 U.S.C. §§ 241 and 242, and sentenced to death. On appeal, we upheld the conviction but reversed the death sentence and remanded for a new penalty trial. *United States v. Causey,* 185 F.3d 407 (5th Cir. 1999). Upon remand, the district court appointed counsel to represent Davis. Davis announced to the court that he desired to represent himself during the penalty trial. He also took the position that he does not want to present traditional mitigating evidence during the penalty trial, but will focus instead on attacking the strength of the government's case as to guilt.

After holding a hearing pursuant to *Faretta v. California,* 422 U.S. 806 (1975), the district court found that Davis's decision to represent himself was made knowingly and intelligently. However, the district court concluded that the *Faretta* right to self-representation does not extend to criminal sentencing, and even if it does, Davis's interests are outweighed by the Eighth Amendment requirement that the death penalty not be imposed arbitrarily and capriciously. Thus, the district court precluded Davis from representing himself and ordered standby counsel to assume full representation and prepare a full penalty phase defense. Davis sought a writ of mandamus in this Court compelling the district court to permit self-representation instead.

On July 17, 2001, this Court issued a writ of mandamus directing the district court to allow Davis to represent himself in the penalty phase of this capital case. We determined that Mr. Davis has a Sixth Amendment right to represent himself during the penalty trial as specified

by the United States Supreme Court in *Faretta,* but we gave the district court the authority to appoint standby counsel. The case was then remanded back to the district court.

On August 30, 2001, the district court issued an order appointing Laurie White to serve as an independent counsel at the penalty phase of this case. According to the order, the independent counsel is to represent the "interest of the public" in having a full and fair penalty phase proceeding. This means that the independent counsel will present traditional mitigating factors in favor of Davis to the jury at the penalty trial.

On October 9, 2001, Davis moved the Court to clarify the July 17, 2001 mandamus order, or alternatively, to issue a second writ of mandamus to the district court overturning the appointment of an independent counsel. In the motion, Petitioner contends that the district court's appointment of an independent counsel "completely eviscerates his *Faretta* right to represent himself pro se." We agree. Therefore, we issue this second writ of mandamus.

II. DISCUSSION

A. The District Court's Rationale

In its Order and Reasons, the district court decided that the appointment of an independent counsel does not conflict with Davis's right to represent himself because Davis would still be allowed to present any evidence he desires. The district court stated that it would allow "Davis full rein in his penalty phase. He may voir dire jurors, make opening statements, question witnesses, call

witnesses, introduce evidence, make objections and present a closing argument, all he desires to do or not do, within the appropriate procedural and evidentiary rules." However, the court found that allowing Davis "full rein" did not mean that he could silence "other potential voices in the courtroom" from presenting evidence they deemed to be helpful to the jury.

The district court justified its determination that Davis's *Faretta* rights are not undermined by the appointment of an independent counsel by opining that both the government and the trial judge play a role in the penalty trial that is similar to the role an independent counsel could play. The district court noted that (1) the government has an obligation to produce mitigating as well as exculpatory evidence to the fact finder if that serves the ends of justice; and (2) the trial judge may interpose questions to witnesses to elicit evidence that might otherwise not be presented. The district court reasoned that:

> An independent counsel, clearly identified as not associated with Davis, could likewise present evidence and question witnesses, providing relevant information helpful to the jury's decision. Just as the government's obligation to disclose mitigation evidence and the Court's prerogative to question witnesses do not interfere with Davis's *Faretta* right, neither would the participation of this independent counsel.

B. The Sixth Amendment Violation

We find that the district court's decision to appoint an independent counsel violates Davis's Sixth Amendment right to self-representation. An individual's constitutional

right to represent himself is one of great weight and considerable importance in our criminal justice system. This right certainly outweighs an individual judge's limited discretion to appoint amicus counsel when that appointment will yield a presentation to the jury that directly contradicts the approach undertaken by the defendant.[1]

1. Proper Role of the Trial Court

At the outset, we note that the district court has misconstrued its proper role in conducting the penalty trial by overstating the parameters within which a judge can question witnesses. Rule 614(b) of the Federal Rules of Evidence permits judges to question witnesses. A trial judge's questioning of witnesses is permissible if aimed at clarifying the evidence or managing the trial. *United States v. Williams,* 809 F.2d 1072, 1087 (5th Cir. 1987).

A judge's questioning, however, should never evince or appear to evince partiality to one side over the other. *See U.S. v. Reyes,* 227 F.3d 263, 265 (5th Cir. 2000) ("[t]he primary limitation on this judicial investigatory power is that it must be undertaken for the purposes of benefitting the jury in its understanding of the evidence, and the court may not appear to be partial"); *U.S. v. Martin,* 189

[1] The district court envisions that the conflict between the independent counsel's presentation and Davis's trial strategy will be ameliorated by instructing the jury that the independent counsel does not represent Davis, but rather her participation is required "by law." In our view, this instruction actually compounds the problem as it gives the independent counsel's presentation an aura of superiority over whatever is presented by the prosecution and the defense.

F.3d 547, 553 (7th Cir. 1999) ("a judge's discretion to question witnesses is not unfettered. A judge cannot assume the role of an advocate for either side."); *United States v. Tilghman,* 134 F.3d 414, 416 (D.C. Cir. 1998) (noting that trial judges must strive to preserve an appearance of impartiality and must err on the side of abstention from intervention). For example, a judge should not ask questions which indicate his belief or disbelief of witnesses. *United States v. Wyatt,* 442 F.2d 858, 859-61 (D.C. Cir. 1971).

In our July 17, 2001 opinion, we noted that the district court may interpose questions to witnesses during the penalty trial. The district court construed this statement as an invitation "to elicit evidence that might otherwise not be presented." The district court further implied that it has the right to elicit evidence from witnesses in a manner similar to that of an independent counsel.

We disagree with the district court's understanding of our previous statement. The district court shall not interpose questions to witnesses during the penalty trial which demonstrate partiality to one side or one position. The district court's role in the penalty trial shall be one of judge, not advocate.

2. Absence of Statutory Authority or Case Law Authority

The district court provides no federal statutory authority for appointing an independent counsel to present mitigation evidence in the penalty phase of a capital case. Instead, the district court relied upon civil cases in which federal courts permitted amicus curiae to assist in the proceedings. We closely scrutinized the "amicus curiae"

cases. None are remotely analogous to the situation in the instant case. Therefore, we deem these cases to be of limited precedential value.

In the reverse but analogous scenario, the federal courts have also addressed whether district judges have the power to appoint special prosecutors when the government elects not to prosecute. In *Nathan v. Smith,* 737 F.2d 1069 (D.C. Cir. 1984), the D.C. Circuit considered whether a district court had the authority to order the Attorney General of the United States to conduct a preliminary investigation pursuant to 28 U.S.C. § 592 of the Ethics in Government Act. The only purpose of the preliminary investigation was to enable a report to be made to the court concerning the need or lack thereof for the appointment of an independent counsel. The D.C. Circuit reversed the district court order which started the special prosecutor appointment process. *Id.*

In the *Matter of An Application for Appointment of Independent Counsel,* 596 F. Supp. 1465 (E.D.N.Y. 1984), the district court determined that it had no authority to appoint independent counsel to prosecute a government informer for giving false evidence and false statements. In *Application,* the Department of Justice had declined to indict the government informer. The applicants, however, argued that the court had the inherent power to appoint a special prosecutor. Judge Glasser rejected this contention for several reasons.

First, Judge Glasser noted that the judges in the Watergate cases of *O'Brien v. The Finance Committee to Re-Elect the President, et al.,* Civ. No. 1233-72 (D.D.C. Sept. 25, 1972) and *United States v. Liddy,* Crim. No. 1827-72 (D.D.C. November 21, 1972) found no basis for the

judicial appointment of special prosecutors. *Id.* at 1469. Second, he determined that no federal statute provided for judicial appointment of a special prosecutor or independent counsel under the circumstances of the case. *Id.* at 1470. Third, he expounded upon the separation of powers problems that would arise from judicial appointment of special prosecutors.[2] *Id.* at 1470-71.

In this Circuit, we have not specifically addressed the judiciary's alleged inherent power to appoint special prosecutors.[3] However, in *United States v. Cox,* 342 F.2d 167, 172 (5th Cir. 1965), *cert. denied,* 381 U.S. 935 (1965) (per curiam), we held that a district court lacked the power to require the United States Attorney to sign indictments, and thereby dispelled the notion that the district court had the power to compel the executive branch to initiate prosecution.[4]

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[2] Judge Glasser's memorandum opinion and order were later vacated because the Second Circuit determined that the applicants did not have standing to apply for appointment of independent counsel. *See Appointment of Independent Counsel,* 766 F.2d 70, 77 (2nd Cir. 1985). Nevertheless, the rationale in the district court's opinion is persuasive.

[3] In *United States v. Cowan,* 524 F.2d 504 (5th Cir. 1975), we considered a case in which a federal district court judge refused to grant an agreed dismissal of a prosecution and appointed private special prosecutors to continue prosecution of the action. As in the case at bar, the district judge justified his decision to appoint special prosecutors on the judiciary's inherent power to protect the public interest. *Id.* at 507. Because we determined that the district judge abused his discretion under Federal Rule of Criminal Procedure 48(a) by denying the government's motion to dismiss the indictment against the defendant, we did not address the propriety of the district court judge's decision to effectuate the denial by appointing special prosecutors. *Id.* at 514.

[4] In *Cox,* the grand jury asked the United States attorney to draft and sign true bills of indictment against certain individuals. The

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We grounded the *Cox* holding on separation of powers concerns. *Id.* at 171 ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."). In our view, allowing federal judges to appoint special prosecutors when the government elects not to prosecute would contravene the *Cox* holding. Therefore, we find it highly unlikely that this Circuit would allow such appointments.

As we have previously stated, the special prosecutor cases are not directly analogous to the instant case, but they remain instructive. In both instances, the district court judge based the decision to appoint a special prosecutor or independent counsel on an alleged inherent judicial power, not statutory authority. There is little distinction between special prosecutors and special (independent) counsel appointed to present evidence calculated to aid the defense. Therefore, the exacting appellate scrutiny applied to judicial appointment of special prosecutors must also be applied to the instant case.

The judiciary's alleged "inherent power" to appoint special prosecutors clashes with Article II, section 3 of the United States Constitution.[5] Similarly, the district court's

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United States attorney, acting on instructions from the Attorney General, refused. The district court ordered the United States attorney to draft and sign such instruments. The United States attorney refused once again. The district court held the attorney in civil contempt. *Id.* at 169, 170.

[5] Article II, section 3 deposits the law enforcement power in the President by providing that he "shall take Care that the Laws be

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alleged inherent authority to appoint independent counsel clashes with the petitioner's Sixth Amendment *Faretta* rights. In both situations, the Constitution prevails over any "inherent judicial power" argument.

3. The Strength and Nature of the Self-Representation Right

The district court's analysis also misses the mark because it fails to take into consideration the strength and nature of the right of self-representation. In *Faretta,* the Supreme Court expounded upon the history at the time of the passage of the Sixth Amendment which underpinned its decision to imply from the text the right of self-representation. The Supreme Court explained that all historical evidence led to the conclusion that the right of self-representation was at the very heart of the Sixth Amendment. *Faretta,* 422 U.S. at 832. Indeed, the Framers "always conceived of the right to counsel as an 'assistance' for the accused, to be used at his option, in defending himself." *Id.*

The district judge appointed the independent counsel because she wants the jury to have a complete picture of all possible traditional mitigating factors. In her view, society's interest in a full and fair capital sentencing proceeding can only be served if all possible aggravating and mitigating factors are presented to the jury. While this notion is certainly noble, it cannot be squared with Davis's self-representation right. *Faretta* teaches us that the right

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faithfully executed." No power to enforce the laws is vested in the judiciary by Article III.

to self-representation is a personal right. It cannot be impinged upon merely because society, or a judge, may have a difference of opinion with the accused as to what type of evidence, if any, should be presented in a penalty trial.

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* at 834 (quoting *Illinois v. Allen,* 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

Davis has indicated that he intends to employ an admittedly risky strategy during the penalty phase. Instead of presenting traditional mitigating evidence, he intends to attack the strength of the government's case as to his guilt.[6] This is a specific tactical decision.[7] Davis has

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[6] There is evidence in the record that Davis has, on various occasions, threatened that he will not present any evidence during the penalty trial. However, based upon his brief, it appears as though Davis will be utilizing his "residual doubt" argument during the penalty trial. There is also evidence in the record to indicate that Davis would prefer the death penalty to be imposed at the sentencing stage. Davis reasons that if he receives the death penalty his legal arguments concerning sufficiency of the evidence will be scrutinized more closely on appeal. His conviction will then have a greater likelihood of being reversed. Although the district court has determined that Davis's actions demonstrate that he invites the death penalty, Davis has consistently maintained that he is not on a suicide mission. Whatever the merits of

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made it quite clear that he does not want any traditional mitigating evidence to be presented on his behalf. Nevertheless, the district court has appointed the independent counsel specifically for the purpose of presenting a full penalty phase defense which will utilize traditional mitigating factors. As such, Davis's strategy is in direct conflict with the independent counsel's approach. Because Davis's right to self-representation encompasses the right to direct trial strategy, the district court's decision to impose an independent counsel into these proceedings is overturned.[8]

III. CONCLUSION

The core of a defendant's right to pro se representation is his ability to preserve actual control over the case

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Davis's legal strategy, we find that Davis has the right to conduct his penalty defense in the manner of his choosing "for it is he who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 820. Therefore, if he so chooses, Davis has the constitutional right to implement his legal strategy by arguing to the jury that he should receive the death penalty.

[7] The district court has found that "residual doubt" as to guilt is a legitimate mitigating factor appropriately argued during the penalty phase of a capital case. The issue of residual doubt is not before us in this appeal and we express no view regarding the correctness of the district court's ruling regarding residual doubt qualifying as a legitimate mitigating factor for the jury to consider in assessing punishment.

[8] Nothing in this opinion should be construed by Davis as any indication that we think his defense strategy is a winning one. Indeed, it may be foolhardy. However, our task is not to cast judgment upon the wisdom of Davis's strategy. Our task is simply to make sure that, as long as he has voluntarily and intelligently chosen to represent himself, he is given the opportunity to employ his own strategy, whatever it may be, without interference from an independent counsel acting at the behest of the judiciary.

he chooses to present to the jury. *McKaskle v. Wiggins,* 465 U.S. 168, 178 (1984). This is so regardless of whether society would benefit from having a different presentation of the evidence. Because Davis will be stripped of his right to preserve actual control over his penalty trial defense if the appointment of the independent counsel is allowed to stand, we conclude that Davis has a clear and indisputable right to mandamus relief and no adequate alternative to mandamus exists. *In re: American Airlines, Inc.,* 972 F.2d 605, 608 (5th Cir. 1992), *cert. denied sub. nom. Northwest Airlines, Inc. v. American Airlines, Inc.,* 507 U.S. 912 (1993). We therefore grant the petition.

We reiterate that the district court may appoint standby counsel for Davis if appropriate. However, during the penalty trial, the district court shall not allow standby counsel to interfere with Davis's self-representation right. Any attempt by standby counsel to present traditional mitigating evidence (against the wishes of Davis) would also violate Davis's *Faretta* right and this writ. *See Myers v. Johnson,* 76 F.3d 1330, 1334 (5th Cir. 1996) (quoting from *McKaskle v. Wiggins,* 465 U.S. at 178) ("If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decision . . . the *Faretta* right is eroded.").

Petition GRANTED, writ ISSUED, and action REMANDED for a sentencing proceeding without the assistance of the appointed independent counsel.

JAMES L. DENNIS, Circuit Judge, dissenting:

The ultimate issue is whether a convicted federal capital murder defendant has the absolute right to choose death as his penalty and thus turn his sentencing hearing under the Federal Death Penalty Act of 1994 ("FDPA")[1] into a charade. The majority misinterprets the record and ignores the district court's fully supported findings of fact, which show that Davis intends to incur the death penalty by presenting no adversary trial defense whatsoever.[2] The

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[1] *See* 18 U.S.C. §§ 3591-3598.

[2] The majority closes its eyes to the fact that Davis has no adversary trial strategy, that he only claims, instead, to have a post-conviction strategy, and, most important, that he is actively seeking a death sentence rather than a life sentence. *See infra* notes 14-15. Crediting Davis's assertion that he is not on a "suicide mission," the majority states that "it appears as though Davis will be utilizing his 'residual doubt' argument during the penalty trial," Maj. Op. at 12 n. 6, in an effort "to attack the strength of the government's case as to his guilt." *Id.* at 12. But Davis's own words reveal that his sole motivation is to receive the death penalty, and he has gone so far as to threaten to do nothing at the sentencing trial in order to realize this goal. At a July 26, 2001 hearing, the district court indicated, for the first time, its intention to appoint amicus counsel for the purpose of developing and presenting mitigating evidence. Davis issued the following ultimatum in response:

> [I]f this case doesn't go forward on August the 13th [, 2001], . . . I am coming in this courtroom and there will be no residual doubt argument, there will be no cross-examination, there will be no opening and closing statements, and I have already made it clear that I'm wearing just what I'm wearing [(a prison jumpsuit)].
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> . . . I'll come in this courtroom, sit down with no problems, and will do absolutely nothing if this case doesn't go forward August the 13th.

Furthermore, even if the majority's statement that Davis is not on a "suicide mission" is correct, his ironic belief that a death sentence might

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majority errs grievously in interpreting the Supreme Court's cases as holding that a criminal defendant's right of self-representation is absolute and that the trial court is therefore powerless to exercise any significant supervision or regulation of the defendant's use of that right. I respectfully but emphatically dissent.

I. OVERVIEW

The majority commits legal error, in this case of first impression, by holding that a federal defendant convicted of capital murder may, prior to a sentencing hearing conducted under the FDPA, waive his right to counsel and assert his right to self-representation for the purpose of incurring the death penalty by presenting no defense at the sentencing hearing.[3] The majority conceives a criminal

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ultimately save his life is irrelevant. As the amicus response correctly states, "Both parties in this case seek the same outcome from the district court – a sentence of death . . . . Petitioner's decision to actively seek a death verdict at the trial level causes the adversary system to disintegrate. Neither party will be asking the jury to consider a sentence of life." Response of National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Affirmance of the District Court's Appointment of Independent Counsel at 2, 8-9. "For this reason, it makes no difference *why* Mr. Davis joins the government in seeking a death verdict. All that matters is that there is no one asking the jury to consider life." *Id.* at 9 n. 3 (emphasis in original).

[3] The majority adheres to the same errors that affected its other post-remand rulings in this case. In dissenting from this court's July 17, 2001 order granting mandamus and directing the district court to permit Len Davis to represent himself in the sentencing phase of this capital case despite his announced intention to seek the death penalty, I explained that both Davis and the majority misinterpreted the Supreme Court's decision in *Faretta v. California*, 422 U.S. 806 (1975). On August 3, 2001, the same divided panel of this court denied the motion of Paul Hardy, Davis's convicted co-defendant, for leave to

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defendant's right to self-representation to be an insuperable right that is not diminished by the dramatic change in the defendant's autonomy interest resulting from his criminal conviction; an impregnable right that so outweighs the national interest in fairness, accuracy, and equality in federal capital sentencing proceedings that it permits of no significant regulation or supplementation by the trial courts; and a right that is so perfect and untrammeled that the convicted capital offender may, within his complete discretion, use it either to make a defense or to condemn himself to death.

But the majority's concept differs sharply from the right to self-representation expounded by the Supreme Court. The Court explained in *Faretta* that "[t]he Sixth Amendment includes a compact statement of the rights necessary to a full defense" and that the right of self-representation is merely one of the constituent rights.[4] It is not an absolute, free-standing right that can run counter to its source, the Sixth Amendment right to make a defense. The Court made this very clear when it said: "The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal

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intervene for the purpose of filing a petition for panel rehearing, or, alternatively, requesting the appointment of amicus curiae to file a petition for panel rehearing, and/or suggesting rehearing *en banc*. I dissented from the August 3 order and suggested that the appointment of an amicus curiae was the proper remedy for the breakdown in the adversary system that resulted when Davis and the government joined forces to advocate for the death penalty. Because my colleagues again use the extraordinary writ of mandamus to vacate a district court decision that is not clearly and indisputably wrong, I dissent for a third time.

[4] *Faretta*, 422 U.S. at 818.

charge may be answered in a manner now considered fundamental to the fair administration of American justice – through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it .... Although not stated in the Amendment in so many words, the right to self-representation – to make one's own defense personally – is thus necessarily implied by the structure of the Amendment."[5] In no way did the Court, in *Faretta* or any other case, ever suggest that self-representation can be separated from the right to make a defense and used negatively to eviscerate the basic Sixth Amendment right to resist the prosecution's attack, as the majority presently holds.

Because the right of self-representation is implied by and inherently part of the Sixth Amendment right to make a defense, the Supreme Court has recognized many exceptions and qualifications to the exercise of self-representation that enable trial courts to prevent it from being used to harm or defeat the basic right to make a defense. For example, the Court pointed out in *Faretta* that even when the defendant seeks to use the right of self-representation for the proper purpose of making a

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[5] *Id.* at 818-19. *See Martinez v. Court of Appeal of California,* 528 U.S. 152, 154 (2000) ("Our conclusion in *Faretta* extended only to a defendant's 'constitutional right to conduct his own defense.' Accordingly, our specific holding was confined to the right to defend oneself at trial.") (citation omitted). *See also United States v. Nixon,* 418 U.S. 683, 709 (1974) ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive.").

defense, the trial court must first determine that the defendant's waiver of the assistance of counsel is knowing and intelligent and that the defendant is aware of the dangers and disadvantages of self-representation.[6] And "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."[7] The trial court "may – even over objection by the accused – appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary."[8] Moreover, contrary to the majority's holding in the present case, *Faretta* left open the trial court's option of mitigating some of the problems resulting from self-representation by "appointing a qualified lawyer to sit in the case as the traditional 'friend of the court.'"[9]

More recently, the Court affirmatively recognized the amicus counsel option and observed other limitations on the right to self-representation in *McKaskle v. Wiggins:*

> A *pro se* defendant must generally accept any unsolicited help or hindrance that may come from the judge who chooses to call and question witnesses, from the prosecutor who faithfully exercises his duty to present evidence favorable to the defense, from the plural voices speaking "for

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[6] *Faretta*, 422 U.S. at 835.

[7] *Id.* at 834 n. 46.

[8] *Id.* Furthermore, "[t]he right of self-representation is not a license to abuse the dignity of the courtroom . . . [or] not to comply with relevant rules of procedural and substantive law." *Id.*

[9] *Id.* at 846 n. 7 (Burger, C. J., dissenting).

> the defense" in a trial of more than one defendant, or from an *amicus* counsel appointed to assist the court.[10]

Accordingly, in *Martinez v. Court of Appeal of California,* the Court flatly stated that, "[a]s the *Faretta* opinion recognized, the right to self-representation is not absolute."[11] After listing several exceptions and qualifications to the right of self-representation, the *Martinez* Court concluded that "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."[12] Moreover, in holding that *Faretta* does not require a state to recognize a constitutional right to self-representation on direct appeal from a criminal conviction, the Court in *Martinez* gave reasons that are significant to the present case:

> The status of the accused defendant, who retains a presumption of innocence throughout the trial

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[10] 465 U.S. 168, 177 n.7 (1984) (citation omitted).

[11] 528 U.S. 152, 161 (2000).

[12] *Id.* at 162. *See id.* at 161-62 (listing some limitations upon the right: "The defendant must voluntarily and intelligently elect to conduct his own defense, and most courts require him to do so in a timely manner. He must first be made aware of the dangers and disadvantages of self-representation. A trial judge may also terminate self-representation or appoint standby counsel – even over the defendant's objection – if necessary. We have further held that standby counsel may participate in the trial proceedings, even without the express consent of the defendant, as long as that participation does not seriously undermine the appearance before the jury that the defendant is representing himself. Additionally, the trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal chores for the defendant that counsel would normally carry out.") (internal quotations and citations omitted).

> process, changes dramatically when a jury returns a guilty verdict . . . .
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> . . . .
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> . . . Yet the overriding state interest in the fair and efficient administration of justice remains as strong as at the trial level. Thus, the States are clearly within their discretion to conclude that the government's interests outweigh an invasion of the appellant's interest in self-representation.[13]

The majority's decision to issue mandamus and reverse the district court's order is incongruous with all of the Supreme Court's cases; it permits the right of self-representation to be torn from the body of the basic Sixth Amendment right to make an adversarial defense and to be used to defeat the hopes and aspirations of that basic constitutionalized right. The majority's prior mandamus should not have issued because the district court was not clearly and indisputably wrong in refusing to allow Davis to waive his right to assistance of counsel and to represent himself. Davis had expressly informed the court that he would not use self-representation to make an adversarial defense as contemplated and protected by the Sixth Amendment.[14] Instead, as he expressly stated, he intended

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[13] *Id.* at 162-63.

[14] After this court reversed his federal death sentence and remanded his case for a new penalty trial, Len Davis informed the district court that he intended to represent himself in those proceedings but also consented to the presence of appointed "co-counsel." The government first moved for a mental status examination of Davis and then filed an objection to this "hybrid representation." In a *pro se* response to the government's objection, Davis said:

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to make no defense whatsoever, so as to ensure a death sentence.[15] Under these circumstances, the national

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I do not beg for my life, and I am not afraid to die. I have already informed the Court that I do not intend to present a defense at the penalty trial, and the government has filed pleadings with the Court stating that the decision is so bizarre that it calls into question my mental competence.

[15] Len Davis's Original Brief, filed by his counsel in this court on June 8, 2001, states:

> At various conferences and hearings before [the] district court Mr. Davis announced that he did not intend to present any evidence, or participate in any aspect of the trial, directed toward convincing the jury that he should not receive the death penalty . . . .
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> . . . .
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> . . . Mr. Davis believes that the[ ] legal issues [he plans to raise in a motion for new trial and/or Rule 2255 motion] will of necessity have to be viewed much more closely by the district and appellate courts if he is facing a death sentence, than they would if he were facing a life sentence. While he has no desire to die he has weighed carefully the prospects of a death sentence against spending the rest of his life in jail – and he finds life in prison to be more onerous. Believing that legal errors that led to his conviction will be examined more scrupulously if he has a death sentence facing him, Mr. Davis made the strategic decision that he does not want to put on mitigating evidence in an effort to convince the jury that he should not die . . . .
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> . . . [W]e believe that the legal strategy which he has undertaken will likely result in his execution. Conversely we believe that if we could mount a full mitigation defense that there is a very good possibility we could save his life. That being so, why are we before this Court arguing a legal position which, if successful, would likely doom our client? The answer lies in the *Faretta* decision. It is his life, not ours. "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta v. California*, [422 U.S. 806, 820 (1975)].

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interest in the fair and efficient administration of justice outweighed the defendant's interest in acting as his own lawyer, since his purpose was to defeat or relinquish his Sixth Amendment right to make a defense in an adversarial criminal proceeding.[16] The present mandamus should not issue for the same reasons and also because the Supreme Court clearly left open to the district court the option that it pursued on remand, namely, appointing a qualified lawyer to sit in the case as amicus curiae or friend of the court to safeguard the national interest in the integrity and fairness of the sentencing hearing and to mitigate some of the damage that will surely result from Davis's decision not to make any defense against the death penalty.

Appellant's Opening Brief at 5-13 (June 8, 2001).

Moreover, at an August 3, 2001 status conference, Davis explained that his refusal to defend himself against the death penalty "is part of my strategy and I think that with the death sentence it will force the Court to take my issues a little more seriously.

[16] As stated by the district court:

> In this case, Davis has persisted in his intention that the jury not have the benefit of any mitigating evidence in the penalty phase of his case. Most recently, he has declared that he wants nothing done at the penalty phase on his behalf at all. To permit Davis to withhold from the jury relevant mitigation undermines the integrity of the judicial process, defeats the reliability of the outcome and subverts our adversary system of justice. Davis in effect is appropriating to himself a judgment that only society, through the jury in this case, can properly make.

United States v. Davis, 150 F. Supp. 2d 926 (E.D. La. 2001).

II. Mitigating Factors and the Eighth Amendment

In *Woodson v. North Carolina,* a plurality of the Supreme Court stated that

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[17]

This emphasis on individualized sentencing contributed to what Justice O'Connor would later identify as a

> tension that has long existed between the two central principles of our Eighth Amendment jurisprudence. In *Gregg v. Georgia,* Justices Stewart, Powell, and Stevens concluded that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." In capital sentencing, therefore, discretion must be "controlled by clear and objective standards so as to produce nondiscriminatory application." On the other hand, this Court has also held that a sentencing body must

[17] 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

> be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense.[18]

"Thus, the Constitution, by requiring a heightened degree of fairness to the individual, and also a greater degree of equality and rationality in the administration of death, demands sentencer discretion that is at once generously expanded and severely restricted."[19] Although this seemingly paradoxical result has been challenged by minority views,[20] it remains the Law of the Land that a sentencing body in a capital case must consider any relevant mitigating evidence.[21] As stated by the Court in

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[18] *California v. Brown,* 479 U.S. 538, 544 (1987) (O'Connor, J., concurring) (internal citations omitted).

[19] *Callins v. Collins,* 510 U.S. 1141, 1151 (1994) (Blackmun, J., dissenting).

[20] *See id.* at 1157 (Blackmun, J., dissenting) ("In my view, the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution."). *But see id.* at 1142-43 (Scalia, J., concurring) ("Surely a different conclusion commends itself – to wit, that at least one of these judicially announced irreconcilable commands which cause the Constitution to prohibit what its text explicitly permits must be wrong .... [D]eath-by-injection ... looks pretty desirable next to ... some of the other cases currently before us which Justice Blackmun did not select as the vehicle for his announcement that the death penalty is always unconstitutional – for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. How enviable a quiet death by lethal injection compared with that!") (citation omitted).

[21] In *Lockett v. Ohio,* Chief Justice Burger stated:

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death.

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Penry v. Lynaugh, "[i]n order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,' the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime."[22]

> But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

438 U.S. 586, 605 (1978) (plurality opinion). In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), a majority of the Court reaffirmed that a sentencer may not be precluded from considering, and may not refuse to consider, relevant mitigating factors. Attempting, perhaps, to harmonize the "two central principles" of the Court's Eighth Amendment jurisprudence, *see supra* text accompanying note 18, Justice Powell wrote:

> Thus, the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all .... By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.

Id. at 112.

[22] 492 U.S. 302, 328 (1989) (quoting *Woodson*, 428 U.S. at 305).

III. Davis Does Not Have A Clear and Indisputable Right to Mandamus Relief

In the order presently at issue, the district court explained:

> The public has a substantial independent interest in being assured of a full and fair sentencing proceeding, in compliance with constitutional and statutory requirements, so that the death penalty is not imposed arbitrarily and capriciously. In order to accommodate this interest, the Court will appoint independent counsel to investigate and present mitigation evidence at the penalty phase. Counsel will be clearly identified as *not* representing Davis, and Davis will be permitted to present whatever defense he deems appropriate on his own behalf.[23]

For Davis to establish entitlement to mandamus relief, he "must show not only that the district court erred, but that it clearly and indisputably erred."[24] Concluding that Davis satisfied this burden, the majority relies on a purported absence of statutory or case law authority and an analogy that it draws between the district court's order and the judicial appointment of special prosecutors. Both lines of reasoning are flawed and reflect the majority's misunderstanding of the nature and scope of Davis's right to self-representation.

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[23] *United States v. Davis*, 180 F. Supp. 2d 797, 798 (E.D. La. 2001) ("*Davis II*").

[24] *In re: Santa Fe Int'l Corp.*, 272 F.3d 705, 714 (5th Cir. 2001) (internal quotation omitted).

A. *Statutory Authority and Constitutional Interpretation*

Finding "no federal statutory authority for appointing an independent counsel to present mitigation evidence in the penalty phase of a capital case,"[25] the majority conspicuously ignores the Federal Death Penalty Act of 1994.[26] Title 18 U.S.C. § 3593(b) provides that when a criminal defendant is found guilty or pleads guilty to an offense punishable by death, the presiding judge "*shall* conduct a separate sentencing hearing to determine the punishment to be imposed."[27] In determining whether a sentence of death is justified, the finder of fact at the sentencing hearing "*shall* consider any mitigating factor . . . ."[28] The ordinary, mandatory meaning of the word "shall"[29] and the comprehensiveness of the FDPA permit only one conclusion: although a defendant may enter a guilty plea and thereby become *eligible* to receive a death sentence, he is not entitled to a choice of penalty. This conclusion reflects Congress's effort, in passing the FDPA, to comply with the Supreme Court's Eighth Amendment jurisprudence, which holds that a death penalty scheme may not limit the sentencer's consideration of mitigating

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[25] Maj. Op. at 7.

[26] *See* 18 U.S.C. §§ 3591-3598.

[27] *Id.* § 3593(b) (emphasis added).

[28] *Id.* § 3592(a) (emphasis added).

[29] *See Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 641 (5th Cir. 1983). *See also Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984).

evidence and corresponding discretion to extend mercy in a given case.[30]

In the typical case contemplated by the FDPA, the convicted defendant presents the mitigating factors that allow the jury to consider a life sentence. But when the adversary system malfunctions, as it does here, the district court is not free to disregard the constitutional and statutory requirement that mitigating evidence and a life sentence be considered. So, while I do not suggest that a convicted defendant can never represent himself and pursue his own strategy in the sentencing phase of a capital case, Davis's admitted attempt to secure a death sentence by not making a defense creates the impermissible risk that the death penalty will not be imposed in accordance with constitutional and statutory law. Thus, I do not think that the district court, in appointing independent counsel for the limited purpose of presenting mitigating evidence, reached an improper balance between the conflicting self-representation and Eighth Amendment concerns in its effort to maintain the integrity of the sentencing hearing required by the FDPA.

As constitutional scholars have observed, "Whenever possible, conflicting [constitutional] provisions should be reconciled and construed so as to give effect to both."[31] The

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[30] *See supra* Part II. *See also United States v. X-Citement Video*, 513 U.S. 64, 73 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court.").

[31] 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 23.17, at 256 (3d ed.1999). The Supreme Court delivered the classic statement of this principle in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821):

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Supreme Court has consistently refused to assign priority among the safeguards enumerated in the Bill of Rights.[32] This case presents a conflict between self-representation and Eighth Amendment interests.[33] The district court's reconciliation of these constitutionally protected interests is manifestly reasonable – so much so that it calls to mind Justice Clark's admonition that "[t]here is no war between the Constitution and common sense."[34] In *Wheat v. United States,* the Court stated that "the essential aim of the

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> What then, becomes the duty of the court? Certainly, we think, so to construe the constitution, as to give effect to both provisions, so far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them, as to preserve the true intent and meaning of the instrument.

Chief Justice John Marshall, who wrote the *Cohens* opinion, had previously stated in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 174 (1803), that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect . . . ."

[32] *See, e.g., Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 561 (1976) (refusing to declare the Sixth Amendment rights of an accused subordinate, in all circumstances, to the First Amendment right of the press to publish).

[33] More accurately, this case presents this conflict in its present posture. I remain convinced that the district court reached the correct result in its May 16, 2001 order by refusing to allow Len Davis to waive his right to counsel and use self-representation to make no defense against the death penalty. *See United States v. Davis,* 150 F. Supp. 2d 918 (E.D. La. 2001). My confidence in this result reflects the Supreme Court's recognition of exceptions and limitations to the right of self-representation. *See supra* notes 4-13 and accompanying text. But the majority nevertheless issued a writ of mandamus on July 17, 2001 requiring the district court to accept Davis's waiver of counsel and self-representation. That order created the conflict between Sixth and Eighth Amendment interests that the district court addressed through its appointment of independent or amicus curiae counsel.

[34] *Mapp v. Ohio,* 367 U.S. 643, 657 (1961).

[Sixth] Amendment is to guarantee an effective advocate for each criminal defendant . . . ."[35] So, "in evaluating Sixth Amendment claims, the appropriate inquiry focuses on the adversarial process . . . ."[36] While *Faretta* recognizes a criminal defendant's right to serve as his own advocate in opposition to the prosecuting authority, neither it nor any of the Court's other cases may be read to permit the right to be exercised in a non-adversarial manner. "Without opponents, the adversary system cannot function."[37] Seeking to remedy this defect, the district court attempted to accommodate both the majority's view of the right of self-representation and the Eighth Amendment requirement that mitigating factors be considered within a capital sentencing proceeding. As the district court explained,

> ours is an adversarial system with opposing sides . . . . The Government is expected to "take a side." The independent counsel envisioned here is to protect the public interest in the fairness and integrity of the proceeding by assuring that the jury has *all* the information needed to make an informed decision.[38]

Given the majority's prior mandamus upholding Davis's peculiar form of self-representation, the district court struck a reasonable balance between the competing constitutional concerns, thereby giving effect to both. Moreover, because the FDPA, which observes the Eighth

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[35] 486 U.S. 153, 159 (1988).

[36] *Id.* (internal quotation omitted).

[37] *United States v. Chagra,* 701 F.2d 354, 361 (5th Cir.1983) (Rubin, J.).

[38] *Davis II,* 180 F. Supp. 2d at 798 n.2.

Amendment guidelines set forth by the Supreme Court, arguably furnishes a statutory basis for the appointment of independent counsel in this case,[39] I find it impossible to conclude that the district court clearly and indisputably erred.

B. *The False Analogy*

The majority finds that the district court improperly appointed independent counsel because, "[i]n the reverse but analogous scenario,"[40] a district judge cannot appoint special prosecutors when the government elects not to prosecute. Although the appointment of a special prosecutor in such a case might be viewed as a "reverse scenario," the analogy is false. Indeed, the majority acknowledges that separation of powers concerns, not involved in Davis's case, were raised in the special prosecutor context: " 'It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.' "[41] In the present case, respect for a coequal branch of government is not at issue. Furthermore, neither the Constitution nor a congressional enactment commits the presentation of mitigating factors in the penalty phase of this capital case to the exclusive discretion of either the

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[39] The appointment of independent counsel is completely consistent with *Faretta* and *McKaskle*. *See supra* text accompanying notes 9-10.

[40] Maj. Op. at 7.

[41] *Id.* at 9 (quoting *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965)).

government or Len Davis.[42] In the absence of a constitutional or statutory grant of exclusive discretionary power, it simply does not follow that "[t]here is little distinction between special prosecutors and special (independent) counsel. . . ."[43] Thus, the majority's scholarly survey of prosecutorial discretion is inapposite to this case.

Although I adhere to my previous statement that the FDPA may provide a statutory basis for the appointment of independent counsel, I also disagree with the majority's conclusion, drawn from its false analogy, that the district court had no inherent power to appoint an independent counsel. I agree, instead, with the district court's recognition that "[a]s a general proposition, the authority of a court to appoint independent or amicus curiae counsel is broad and well-established."[44] The exercise of this authority is particularly appropriate in cases that challenge the proper functioning of the adversary system because a "case conceived in cooperation may be saved by intervention of a

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[42] The Supreme Court's "self-representation" jurisprudence also does not support the majority's requirement that all mitigating evidence received at the federal capital sentencing hearing be presented by the convicted defendant or with his blessing. *See Faretta v. California,* 422 U.S. 806, 846 n.7 (1975) (Burger, C. J., dissenting) ("Some of the damage we can anticipate from a defendant's ill-advised insistence on conducting his own defense may be mitigated by appointing a qualified lawyer to sit in the case as the traditional 'friend of the court.' The Court does not foreclose this option."); *McKaskle v. Wiggins,* 465 U.S. 168, 177 n.7 (1984) ("A *pro se* defendant must generally accept any unsolicited help or hindrance that may come from . . . an *amicus* counsel appointed to assist the court.") (citation omitted).

[43] Maj. Op. at 10.

[44] *Davis II,* 180 F.Supp.2d at 799-800. *See United States v. Louisiana,* 751 F.Supp. 608, 620 (E.D. La. 1990), and the authorities cited therein. *See also supra* note 42.

genuine adversary who represents the rights that otherwise might be adversely affected."[45] The district court's order merely attempts to preserve the adversarial posture required by the constitutional and statutory provisions relevant to this case.[46]

C. *Additional Authority Supporting the District Court's Order*

It is true that there are no cases explicitly affirming the propriety of appointing independent counsel to develop and present mitigating evidence in a federal capital sentencing proceeding because of the convicted defendant's refusal to do so.[47] But it is precisely the *res nova* status of this case that demands this court's consideration of any credible authority that addresses the issues now before us. Judge Berrigan examined various state courts' treatment of the specific issue of appointing independent counsel in a capital sentencing proceeding and found ample support for her order.[48] For example, in *Muhammad v. State,* the

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[45] 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3530, at 319 (2d ed. 1984). *See also United States v. Chagra,* 701 F.2d 354, 361 (5th Cir. 1983) (Rubin, J.).

[46] *See supra* Parts II-III.A.

[47] This dearth of case law reflects that prior to 2001, the federal government had not executed a civilian since 1963. Timothy James McVeigh, convicted of the April 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, was executed on June 11, 2001. His immediate predecessor to federal capital punishment was convicted murderer Victor Feguer, who was executed on March 15, 1963.

[48] *See Davis II,* 180 F.Supp.2d at 804-07.

Supreme Court of Florida established the following responsive measures for cases where a convicted defendant refuses to present mitigating evidence:

> Having continued to struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation, we have now concluded that the better policy will be to require the preparation of a PSI [(presentence investigation report)] in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence. To be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background. In addition, the trial court could require the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records. Further, if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses. This precise procedure has been suggested by the New Jersey Supreme Court in *State v. Koedatich,* 112 N.J. 225, 548 A.2d 939, 992 (1988), and recognized as appropriate by the Georgia Supreme Court in *Morrison v. State,* 258 Ga. 683, 373 S.E.2d 506, 509 (1988). *If the trial court prefers that counsel present mitigation rather than calling its own witnesses, the trial court possesses the*

> *discretion to appoint counsel to present the mitigation* as was done in *Klokoc v. State,* 589 So.2d 219 (Fla.1991) or to utilize standby counsel for this limited purpose.[49]

In Florida, the jury serves in an advisory capacity only; the trial judge makes the final penalty decision. When a convicted defendant does not oppose the death penalty, the now-mandated presentence investigation report facilitates an informed decision as to whether a death sentence should be imposed by providing the trial judge with the available mitigating evidence or alerting him, in certain cases, to "the probability of significant mitigation."

In *Smith v. State,*[50] the Supreme Court of Indiana found no error in a trial court's refusal to appoint special counsel to gather and present mitigating evidence at the sentencing hearing of a defendant who negotiated a plea agreement that called for the death penalty. Although the court reached a different conclusion from its Florida counterpart on the propriety of appointed counsel, it noted that Indiana law requires the trial court, acting through its probation department, to investigate the defendant's background and any mitigating circumstances.[51] This investigation "culminates in a [presentence] report to be considered before determining the appropriateness of the death sentence."[52] The court admitted that discovering

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[49] 782 So.2d 343, 363-64 (Fla. 2001) (footnotes omitted) (emphasis added).

[50] 686 N.E.2d 1264 (Ind. 1997).

[51] *See id.* at 1276.

[52] *Id.*

mitigating evidence "is more difficult when the defendant does not wish to assist, but it is not impossible."[53] It then found that the probation department made a "good faith effort" to uncover mitigating evidence despite Smith's refusal to provide it and concluded that the presentence report and the record as a whole "reflects that Smith's death sentence was appropriate to the nature of the offense and offender."[54]

The FDPA, on the other hand, states that "no presentence report shall be prepared" when a defendant is found guilty or pleads guilty to an offense punishable by death.[55] The jury – or the court alone if there is no jury – is therefore limited to the information received during the sentencing hearing.[56] Thus, the district court recognized the importance of presenting mitigating evidence at the hearing, "as that is the only opportunity for it to be heard."[57] While Davis can certainly control the information he gives, today's decision by the majority extends his control to all mitigating evidence, regardless of its source or potential impact on the sentencing body. The district court reasonably concluded that a death sentence obtained in such a distorted manner is likely to fall short of constitutional standards of reliability.

Like the majority, the states that have taken an absolutist position on the convicted defendant's right to

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[53] *Id.*

[54] *Id.*

[55] 18 U.S.C. § 3593(c).

[56] *See id.* § 3593(d).

[57] *Davis II*, 180 F.Supp.2d at 806.

self-representation have done so in misguided reliance on the Supreme Court's decision in *Faretta*.[58] But in its most recent pronouncement on *Faretta*, *Martinez v. Court of Appeal of California*, the Supreme Court recognized that "the right to self-representation is not absolute," that "[e]ven at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer," and that "[t]he status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when a jury returns a guilty verdict."[59] "[T]he autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*."[60] "Yet the overriding state interest in the fair and efficient administration of justice remains" constantly strong throughout the trial and appeal.[61]

As in an appeal, the defendant entering the sentencing phase of a capital case has already been convicted. Applying *Martinez* by analogy to the present case, it follows that Len Davis's autonomy interests, which became less compelling after his conviction, have been further diminished by the purpose for which he seeks to act as his own attorney. His purpose is neither to disengage from unreliable or incompetent counsel nor to make a personal, adversarial defense, but rather to ensure a death sentence by offering no defense at all. The holding and

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[58] *See, e.g., People v. Bloom*, 774 P.2d 698 (Cal. 1989).

[59] 528 U.S. 152, 162 (2000).

[60] *Id.* at 163.

[61] *Id.*

reasoning of *Faretta* do not sanction self-representation by a convicted defendant who seeks to render himself defenseless against the death penalty. In other words, the autonomy interests that survived Davis's conviction are now outweighed by the public's interest in the fair and faithful administration of justice, an interest that is even more acute in a death penalty case. Therefore, the district court's appointment of independent counsel to represent this national interest did not deprive Davis of a constitutional right.

UNITED STATES OF AMERICA
versus Len DAVIS, et al.

CRIMINAL ACTION NO. 94-381 SECTION "C" (4)

UNITED STATES COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

180 F. Supp. 2d 797; 2001 U.S. Dist. LEXIS 22246

August 30, 2001, Decided
August 30, 2001, Filed; August 31, 2001, Entered

COUNSEL: Len Davis, Plaintiff or Petitioner, Pro se.

For Plaintiff or Petitioner: Julian Murray, Metairie, LA.

For Plaintiff or Petitioner: Carol Kolinchak, Laurie White, N.O., LA.

JUDGES: HELEN G. BERRIGAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: HELEN G. BERRIGAN

OPINION: ORDER AND REASONS

The defendant, Len Davis ("Davis"), is representing himself *pro se,* with standby counsel to assist, in the penalty phase of this remanded capital case. He has consistently stated his intention to present no evidence in mitigation of the death penalty and invites the death penalty to be imposed. This Court previously revoked Davis' self-representation and ordered his standby counsel to assume full representation and to prepare a full penalty phase defense. That decision was reversed by the Fifth Circuit Court of Appeals, which concluded that Davis had the right to represent himself, regardless of his

intentions, citing *Faretta v. California,* 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975).

The Court has considered the thoughtful memorandum filed by the Government in opposition to the appointment of independent counsel as well as Davis' consistent position adverse to mitigation evidence. The Court has also considered the memorandum filed by co-defendant Paul Hardy ("Hardy") in support of appointment of independent counsel.

The public has a substantial independent interest in being assured of a full and fair sentencing proceeding, in compliance with constitutional and statutory requirements, so that the death penalty is not imposed arbitrarily and capriciously. In order to accommodate this interest, the Court will appoint independent counsel to investigate and present mitigation evidence at the penalty phase. Counsel will be clearly identified as *not* representing Davis, and Davis will be permitted to present whatever defense he deems appropriate on his own behalf.[1]

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[1] The Court adopts all the reasons given in its previously issued Order and Reasons, May 16, 2001, and this Court's July 31, 2001 letter requesting reconsideration of that decision (attached as Appendix I), as justification here also for the appointment of independent counsel.

The Public Interest in a Full and Fair Sentencing Proceeding[2]

The United States Supreme Court has stressed the "truly awesome responsibility" of a capital jury in "determining whether a specific human being should die at the hands of the State." *Caldwell v. Mississippi,* 472 U.S. 320, 329, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985). The finality of the consequences requires factual accuracy and procedural fairness.

> Recognizing the unique seriousness of [capital sentencing] we have repeatedly emphasized that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.
>
> For that reason, we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding.

Strickland v. Washington, 466 U.S. 668, 704, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) (Brennan, J., concurring in part and dissenting in part) (internal citation and quotations

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[2] The Government suggests that it has the responsibility to "represent the public's interest in seeing that justice is done." Memorandum of Government at n.1. Nevertheless, as Hardy points out, ours is an adversarial system with opposing sides. See Memorandum of Paul Hardy at 4. The Government is expected to "take a side." The independent counsel envisioned here is to protect the public interest in the fairness and integrity of the proceeding by assuring that the jury has all the information needed to make an informed decision.

omitted); *see also Monge v. California,* 524 U.S. 721, 731, 141 L. Ed. 2d 615, 118 S. Ct. 2246 (1998).

The Supreme Court has frequently held that a pivotal requirement of a constitutionally sound death penalty system is individualized sentencing with jury consideration of mitigating factors about the offense and the offender.

> [A] sentencing system that allow[s] the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we . . . have held . . . to be required by the Eighth and Fourteenth Amendments. . . . A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.
>
> Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances.

Jurek v. Texas, 428 U.S. 262, 271, 49 L. Ed. 2d 929, 96 S. Ct. 2950 (1976); *see also Eddings v. Oklahoma,* 455 U.S. 104, 112, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982) ("[T]he sentencer in capital cases must be permitted to consider any relevant mitigating factor. . . . ").

Indeed, the Supreme Court has repeatedly emphasized that the requirement of individualized sentencing and the presentation of mitigating factors not only satisfies constitutional requirements but also fulfills fundamental values in our society.

> If the sentencer is to make an individualized assessment of the appropriateness of the death

> penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a uniquely individual human being[ ] and has made a reliable determination that death is the appropriate sentence. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime.

Penry v. Lynaugh, 492 U.S. 302, 319, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989) (internal citations and quotations omitted) (emphasis in original).

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> * * *

> [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 304, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) (internal citations omitted). The law requires that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings,* 455 U.S. at 112.

Appointment of Independent Counsel and the Faretta Right of Self-Representation

As a general proposition, the authority of a court to appoint independent or amicus curiae counsel is broad and well-established.

> A federal district court possesses the inherent authority to appoint an amicus curiae to assist the court in its proceedings. *United States v. Michigan,* 116 F.R.D. 655, 660 (W.D. Mich. 1987); *cf. Morales v. Turman,* 820 F.2d 728, 731 (5th Cir. 1987). The privilege of being heard amicus rests solely within the discretion of the court. *Leigh v. Engle,* 535 F. Supp. 418, 420 (N.D. Ill. 1982); *accord U.S.F. & G. Co. v. Victory Land Co.,* 410 So. 2d 359, 361 (La. App. 4th Cir.), *writ denied,* 412 So. 2d 1113 (La. 1982); *Parent-Community Alliance for Quality Education, Inc. v. Orleans Parish School Bd.,* 385 So. 2d 33, 34 (La. App. 4th Cir.), *writ denied,* 386 So. 2d 1379 (La. 1980). Generally, courts have exercised great liberality in permitting an amicus curiae to file a brief in a

> pending case, and, with further permission of the court, to argue the case and introduce evidence. *Michigan,* 116 F.R.D. at 660-61; *cf. Morales,* 820 F.2d at 731. There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to or otherwise desirable by the court. *Leigh,* 535 F. Supp. at 420; *cf. New England Patriots Football Club, Inc. v. University of Colorado,* 592 F.2d 1196, 1198 n.3 (1st Cir. 1979). Absent a statute to the contrary, no distinction is made between the request of a private person for leave to appear amicus and one by an agent of the government. *Leigh,* 535 F. Supp. at 420; *see Braddy v. Southern Bell Tel. & Tel. Co.,* 458 F.2d 666, 668 (5th Cir. 1972).

United States v. Louisiana, 751 F. Supp. 608, 620 (E.D. La. 1990). *See also Morales v. Turman,* 820 F.2d 728 (5th Cir. 1987); *Martinez v. Capital Cities/ABC-WPVI,* 909 F. Supp. 283, 286 (E.D. Pa. 1995); *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.,* 149 F.R.D. 65, 82 (D.N.J. 1993); *Alexander v. Hall,* 64 F.R.D. 152, 155 (D. S.C. 1974).

To this Court's knowledge, this is the first federal case where a capitally convicted defendant wishes to proceed *pro se* and present no evidence in mitigation of the death penalty. The Court is therefore unaware of any federal case dealing with the specific propriety of appointing independent counsel to develop and present that evidence in lieu of the defendant's anticipated refusal to do so. Nevertheless, the *Faretta* decision itself, and subsequent federal and state caselaw, has convinced this Court that such an appointment is both permissible and appropriate.

It is important to begin by noting that the *Faretta* case itself dealt with a criminal defendant whose request to represent himself was totally denied by the trial judge. Therefore, his entire defense was conducted by and through his attorney. The Supreme Court found this complete denial of self-representation to be an unconstitutional infringement on *Faretta's* Sixth Amendment rights. The Fifth Circuit has now ruled, based upon *Faretta,* that Davis is entitled to represent himself and present whatever defense he chooses. This Court, of course, will abide by that decision and allow Davis full rein in his penalty phase. He may voir dire jurors, make an opening statement, question witnesses, call witnesses, introduce evidence, make objections and present a closing argument, all as he desires to do or not do, within the appropriate procedural and evidentiary rules. The Court does not believe, however, that Davis' right of self-representation extends to silencing other potential voices in the courtroom. As the Fifth Circuit itself noted, the government will also be introducing evidence and it is "charged in this matter with seeking not the death penalty but justice," a reminder to the government of its obligation to produce exculpatory or mitigation evidence to the fact finder. *United States v. Davis,* No. 01-30656, slip opinion at * 7 (5th Cir. July 17, 2001). Likewise, this Court "may interpose questions to witnesses," presumably an invitation to the Court to elicit evidence that might otherwise not be presented. *Id.* An independent counsel, clearly identified as *not* associated with Davis, could likewise present evidence and question witnesses, providing relevant information helpful to the jury's decision. Just as the government's obligation to disclose mitigation evidence and the Court's prerogative to question witnesses do not

interfere with Davis' *Faretta* right, neither would the participation of this independent counsel.[3]

In *McKaskle v. Wiggins,* 465 U.S. 168, 79 L. Ed. 2d 122, 104 S. Ct. 944 (1984), the United States Supreme Court determined "what role standby counsel who is present at trial over the defendant's objection may play consistent with the protection of the defendant's *Faretta* rights." *Id.* at 170. As a preliminary but significant point, the *McKaskle* case involved *standby* counsel; counsel appointed to assist the defendant and who was clearly identified to the court and jury as aligned with the defendant, not *independent* counsel, unidentified with the defendant. *McKaskle* dealt also with the *trial* phase of a noncapital criminal case. In the situation currently facing this Court – the penalty phase of a capital case – compelling Eighth Amendment concerns, already discussed above, and simply not applicable in the trial stage, must also be taken into consideration.

In *McKaskle,* the defendant requested to proceed *pro se;* the trial court acquiesced but appointed standby counsel to assist the defendant. Standby counsel then

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[3] Appointing independent counsel would also avoid the conflict and confusion of adversarial roles if the prosecutor were required to present full mitigation as well as aggravation. It also avoids the appearance of partiality that would be created if the trial judge actively participated in calling witnesses.

The Government expresses concern that the appointed attorney will necessarily carry the "imprimatur of the court." Memorandum of Government at 8. The Court disagrees. While it is premature to decide what specifically the jury will be told, the Court envisions a simple explanation to the effect that "the law" calls for the participation of independent counsel.

interjected himself into the proceedings, unsolicited by the defendant and over his continuing objection. According to the Fifth Circuit, which reversed the conviction on direct appeal, standby counsel "continuously participated in the proceedings, both in and outside the presence of the jury. In addition to making objections too numerous to cite, counsel on several occasions cursed, argued with defendant, and moved for mistrial against the defendant's wishes." *Wiggins v. Estelle,* 681 F.2d 266, 269-70 (5th Cir. 1982). The Fifth Circuit reversed the conviction on the basis of *Faretta,* and declared the following:

> The rule that we establish today is that court-appointed standby counsel is "to be seen, but not heard." By this we mean that he is not to compete with the defendant or supersede his defense. Rather, his presence is there for advisory purposes only to be used or not used as the defendant sees fit.

Wiggins v. Estelle, 681 F.2d at 273 (footnotes omitted).

The United States Supreme Court granted certiorari, quoted the above "rule," declared it unacceptable, reversing the Fifth Circuit and reinstating the conviction.

The Supreme Court began its analysis by pointing out that *Faretta* was a case in which the criminal defendant was required to present his case "exclusively" through counsel. *McKaskle,* 465 U.S. at 174. Wiggins, on the other hand, was allowed to organize and control his own defense, "to make motions, argue points of law, participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." *Id.* The Supreme Court therefore characterized Wiggins' complaint as directed not at restrictions placed on *his* participation,

as there were none, but rather on the failure of the trial court to limit the participation of his standby counsel, which Wiggins claimed interfered with his *pro se* defense. The Supreme Court noted that "*Faretta* itself dealt with the defendant's affirmative right to participate, not with the limits on standby counsel's additional involvement." *Id.*[4] This Court believes that the distinction between allowing the defendant his affirmative voice but not necessarily silencing the voices of others is significant. While *McKaskle* dealt specifically with the role of standby counsel *for* a defendant, the Supreme Court discussed the possibility of *other* participants in the courtroom presenting evidence, *including an independently appointed amicus curiae counsel.* Significantly, the Court distinguished these as *not* being voices "for the defense." *Id.*

> A *pro se* defendant must generally accept any unsolicited help or hindrance that may come from the judge who chooses to call and question witnesses, from the prosecutor who faithfully exercises his duty to present evidence favorable to the defense, from the plural voices speaking 'for the defense' in a trial or [sic] more than one defendant, or

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[4] The Supreme Court cited favorably the then-current American Bar Association, Standards for Criminal Justice, § 6-3.7 (2d ed. 1980) which stated that standby counsel may "call the judge's attention to matters favorable to the accused upon which the judge should rule on his or her motion . . . " and Rule 711 of the Uniform Rules of Criminal Procedure to the same effect. *McKaskle,* 465 U.S. at 180 n.10. The current version of Standard 6-3.7 states in part that the trial judge should ensure that standby counsel not actively participate in the defense unless requested by the accused "or directed to do so by the court."

> *from an amicus counsel appointed to assist the court.*

Id. at 177 n.7 (emphasis added).

In support of the above, the *McKaskle* court cited Judge Burger's concurring opinion in *Brown v. United States,* 105 U.S. App. D.C. 77, 264 F.2d 363 (D.C. Cir. 1959). Judge Burger argued that a court could assign counsel without the consent of the accused. He gave the following rationale:

> It is axiomatic that more than the rights of an accused are involved in a criminal case. In some circumstances, for example, where an indictment covers such complex questions of law and fact that the court thinks the accused unable to understand their import, *an amicus curiae could properly be appointed without the accused's consent. The accused should, however, still be permitted to present his own case without reference to what is presented by the amicus curiae.* Vindication of the processes of justice would require such a procedure in some cases.

Brown v. United States, 264 F.2d at 369, *cited in McKaskle,* 465 U.S. at 177 n.7 (emphasis added).

Later in the *McKaskle* decision, the Supreme Court noted that the *Faretta* court itself specifically relied upon another District of Columbia appellate decision, *United States v. Dougherty,* 154 U.S. App. D.C. 76, 473 F.2d 1113 (D.C. Cir. 1972):

> In its footnote on standby counsel *Faretta* cited three pages of *Dougherty, supra,* in which we find this statement:

> "The utility of an *amicus* appointment is dependent on explanation to and cooperation by the defendant, and on understanding, too, that he may claim with some merit that his *pro se* rights include his right to appear before the jury in the status of one defending himself, and that this is defeated if a too conspicuous role is played by an attorney, *unless it clearly appears to the jury that he does not have the status of defense counsel.*"

McKaskle, 465 U.S. at 178 n.9 (citing *Dougherty,* 473 F.2d at 1125) (emphasis added).

Immediately after the passage from *Dougherty* quoted by the Supreme Court in *McKaskle* and cited in its *Faretta* opinion, the D.C. Circuit included the following footnote:

> There is a distinction in function between an amicus appointed to assist defendant and one appointed to assist the court. The latter may call witnesses and ask questions, without reference to the defendant, under the same authority that permits the judge himself to take such action in the interest of justice.

United States v. Dougherty, 473 F.2d at 1125 n.18.

It appears clear to this Court that the Supreme Court in *McKaskle,* and arguably even in *Faretta* itself, has acknowledged the possibility and propriety of appointing independent counsel when a *pro se* litigant insists on representing himself. As long as the jury is made to understand that that independent counsel is *not* representing the defendant, then *Faretta* is not violated.

The Seventh Circuit dealt with the interaction of a *pro se* defendant with his standby counsel in a post-*Faretta* but pre-*McKaskle* decision. *See United States v. Taylor,* 569

F.2d 448 (7th Cir. 1978). In that case, the defendant elected to proceed *pro se,* but the trial court appointed counsel to advise him and "charged him with the additional responsibility of seeing to it that all of the facts favorable to the defendant would be brought out at trial." *Id.* at 451. During the trial, the defendant was not restricted in any way from participating. He nonetheless maintained his objection to the participation by appointed counsel. The Seventh Circuit found no *Faretta* violation:

> We recognize that Faretta holds that an accused has a constitutional right to dispense with the assistance of counsel and to conduct his defense personally. It does not inevitably follow, however, that this right of self-representation comprehends any correlative right to preclude the trial court from *appointing counsel and authorizing him to participate in the trial over the accused's objection in order to protect the public interest in the fairness and integrity of the proceedings.*[2]

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[2] As Mr. Chief Justice Burger noted in *Mayberry v. Pennsylvania,* 400 U.S. 455, 467-68, 91 S. Ct. 499, 506, 27 L. Ed. 2d 532 (1971) (concurring opinion),

> "When a defendant refuses counsel . . . or seeks to discharge him, a trial judge is well advised as so many do to have such 'standby counsel' to perform all the services a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence and making closing argument. No circumstance that comes to mind allows an accused to interfere with the absolute right of a trial judge to have such 'standby counsel' to protect the rights of accused persons 'foolishly trying to defend themselves,' as Mr. Justice Douglas so aptly described it. In every trial there is more at stake than just the interests of the accused; the integrity of the process warrants a trial judge's exercising his discretion to have counsel participate in the defense,

(Continued on following page)

United States v. Taylor, 569 F.2d at 452 & n.2 (emphasis added).

The *Taylor* court also noticed *Faretta*'s reliance on the *Dougherty* decision and anticipated the ultimate ruling of the Supreme Court in *McKaskle:*

> In view of the *Faretta* Court's approving citation of *United States v. Dougherty,* 154 U.S. App. D.C. 76, 87-89, 473 F.2d 1113, 1124-26 (1972), it is not at all clear the Court meant that appointed counsel was constitutionally relegated to only a "standby" role. In *Dougherty,* after all, the District of Columbia Circuit had expressly approved of appointed counsel's serving both as a "standby" adviser to a pro se defendant and *as a friend of the court authorized to act independently of the accused in order to protect his rights in the interests of justice.* See 154 U.S. App. D.C. at 88 & nn.18-19, 473 F.2d at 1125 & nn.18-19.

569 F.2d at 453 n.3 (internal citations omitted) (emphasis added).

The Uniform Rules of Criminal Procedure also anticipate standby counsel in *pro se* criminal cases assuming a substantial role:

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even when rejected. A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself."

> Notwithstanding acceptance of a waiver (of counsel), the court may appoint standby counsel to assist when called upon by the defendant, to call the court's attention to matters favorable to the defendant upon which the court should rule on its own motion, and if it becomes necessary for a fair trial, to conduct the defense.

Uniform R. Crim. P. 711(c)

Again, it is important to be reminded that all of these above discussions occurred in the context of *Faretta*'s scope during *the trial stage.* The case before this court deals with the penalty phase of a capital case where compelling Eighth Amendment concerns are implicated, concerns not present during the trial stage. Also, while the *McKaskle* and *Taylor* decisions specifically concerned the role of standby counsel, the possibility of a court appointing independent amicus counsel was not only acknowledged but implicitly endorsed.

In its most recent pronouncement on *Faretta,* the Supreme Court held that it did not extend to the appellate stage of a criminal case, overruling several circuits to the contrary, including the Fifth. *See Martinez v. Court of Appeal of California,* 528 U.S. 152, 145 L. Ed. 2d 597, 120 S. Ct. 684 (2000). In so holding, the Court noted that *Faretta* itself recognized that the right to self-representation is not absolute. "Even at the trial level . . . the government's interest in ensuring the integrity and

efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id.* at 162.[5]

While no federal court has dealt with the specific issue of appointment of independent counsel in the penalty phase of a capital case, several state courts have. Just seven months ago, the Florida Supreme Court issued guidelines for trial judges in state capital cases on ways to deal with defendants who refuse to present available mitigation and argue for death. *See Muhammad v. State,* 782 So. 2d 343 (Fla. 2001). In that state, the jury serves in an advisory capacity only, with the judge making the final decision as to the penalty. The Florida high court had the following suggestions:

> Having continued to struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation, we have now concluded that the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence. To be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background. In addition, the trial court could require the State to place in the

[5] The *Martinez* majority also acknowledged lower court and law journal commentary critical of the *Faretta* decision (and urging that it be revisited). *See* 528 U.S. at 161 nn.9-10.

> record all evidence in its possession of a mitigating nature such as school records, military records, and medical records. Further, if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses. This precise procedure has been suggested by the New Jersey Supreme Court in *State v. Koedatich,* 112 N.J. 225, 548 A.2d 939, 992 (1988), and recognized as appropriate by the Georgia Supreme Court in *Morrison v. State,* 258 Ga. 683, 373 S.E.2d 506, 509 (1988). *If the trial court prefers that counsel present mitigation rather than calling its own witnesses, the trial court possesses the discretion to appoint counsel to present the mitigation as was done in Klokoc v. State,* 589 So.2d 219 (Fla.1991) or to utilize standby counsel for this limited purpose.

782 So. 2d at 363 (footnotes omitted) (emphasis added).

In his concurring opinion, Justice Pariente called for the appointment of independent counsel in every case where the defendant refuses to present mitigation, *Faretta* notwithstanding. This counsel's responsibility would be to present available mitigation to the advisory jury, the trial court and the Florida Supreme Court.

> This procedure, of course, would not prevent the defendant himself or herself from arguing in favor of the death penalty.
>
> Adoption of this procedure would serve to promote several important interests critical to the integrity of the process: (1) it would assist any advisory jury in making a more informed sentencing recommendation of either death or life and in fulfilling its statutory obligation to weigh

> mitigating and aggravating circumstances . . . ; (2) it would assist the trial court in making a more informed decision as to whether to impose the death sentence by ensuring that the court has before it the available mitigating evidence; and (3) it would facilitate this Court's constitutionally mandated obligation to review each death sentence for proportionality.
>
> I also believe that adoption of this procedure would serve the important additional goal of promoting finality when a sentence of death is imposed.

782 So. 2d at 370-71 (Pariente, J., specially concurring).

As noted, the jury in Florida serves in an advisory capacity with the judge making the final determination. The judge can draw on sources unavailable to the jury, such as the now-mandated presentence investigation report. In a federal case, on the other hand, the jury makes the final determination and is limited to what is presented during the penalty phase itself. All the more reason, therefore, to assure that available mitigation evidence be presented there, as that is the only opportunity for it to be heard.

In an earlier Florida Supreme Court case, then Justice and now Judge Rosemary Barkett of the Eleventh Circuit endorsed appointment of independent amicus counsel for a condemned defendant who refused to present mitigation:

> How then can we accommodate society's need for the information necessary to make an informed judgment as well as a defendant's right to represent himself or remain silent? The compromise

> suggested by Hamblen's appellate counsel appears to be a sensible and viable solution in these rare cases. Hamblen's attorney does not suggest that his client be precluded from exercising his constitutional right to represent himself. Rather, he argues that separate public counsel be appointed to present the case for mitigation. I agree with this proposal. Reliability in imposing the death penalty, in my opinion, can be achieved only in the context of a true adversarial proceeding. Appointing independent public counsel to present whatever mitigating factors reasonably can be discovered under the circumstances of a given case would satisfy society's need for a reliable and proportionate sentence without infringing upon the defendant's right of self representation.

Hamblen v. State, 527 So. 2d 800, 809 (Fla. 1988) (Barkett, J., dissenting as to penalty).

In *Klokoc v. State,* 589 So. 2d 219 (Fla. 1991), the Florida Supreme Court noted that "Klokoc refused to allow his counsel active participation on his behalf in the penalty phase and refused to cooperate or allow counsel to present evidence by family members in mitigation. As a result, counsel moved to withdraw. That motion was denied by the court, but, in view of Klokoc's lack of cooperation with his counsel, the court appointed special counsel to represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceeding." *Id.* at 220. Special counsel, representing the public interest, cross-examined the state's witnesses and, after Klokoc expressly prohibited *his* counsel from presenting any evidence, special counsel then presented both expert and lay witnesses in mitigation.

In *State v. Koedatich,* 112 N.J. 225, 548 A.2d 939 (N.J. 1988), the defendant instructed his attorney to do nothing in the penalty phase of his capital trial; his attorney acquiesced and the defendant was sentenced to death. The New Jersey Supreme Court reversed the sentence due to an error in the jury instructions, but added the following with regard to trial counsel's failure to present mitigation:

> "Although counsel in this case fulfilled his obligations to his client, he failed to perform a role assigned to him by the state, that of presenting the mitigating evidence necessary to assure the reliability of the penalty determination. But the fact that the state assigns defense counsel a role which may require him to act contrary to his client's wishes on a matter of such vital importance to the client presents a troubling picture. The defense of a capital case often requires a close and trusting relationship between counsel and client; yet our decision requires counsel to violate that trust, to take a position against his client, and perhaps to present evidence revealed to him in confidence by his client.
>
> Trial courts should explore methods of alleviating this conflict. In some cases it might be desirable for counsel, in addition to presenting mitigating evidence, to inform the jury of defendant's personal position. In other cases, the court might permit the defendant himself to address the jury. Alternatively, the court could call persons with mitigating evidence as its own witnesses, or *appoint new counsel to call them,* and thereby place on the record the mitigating evidence essential to a careful, balanced penalty determination.
>
> In sum, both the state's need to assure the fairness and reliability of the penalty determination,

> and defendant's rights to personal choice and dignity, command respect. It is essential that the penalty trial constitute a balanced presentation of aggravating and mitigating evidence, but this goal should be achieved, as far as possible, with respect and accommodation for defendant's personal values and for his relationship with counsel."

548 A.2d at 996-97 (quoting *People v. Deere,* 41 Cal. 3d 353, 710 P.2d 925, 935, 222 Cal. Rptr. 13 (Cal. 1985) (Broussard, J., concurring)) (footnotes omitted) (emphasis added).

In *State v. Dodd,* 120 Wn.2d 1, 838 P.2d 86 (Wash. 1992), the defendant, after consulting with counsel, chose not to present available mitigation evidence at the penalty phase of his trial and was sentenced to death. He then sought to waive general appellate review. His stated goal was to be executed. The specific issue in the case was whether a defendant could waive such review under state law and, if yes, whether Dodd's waiver was competent. In order to consider these issues fully, the Washington Supreme Court designated Dodd's trial counsel as amici curiae and then appointed new counsel to represent Dodd on the competency of his waiver. The amici curiae presented legal arguments against finding waiver permissible, which was contrary to the defendant's position. The high court concluded that under state law, a defendant could waive general appellate review but could not waive statutory sentence review. The court then considered the appropriateness of the sentence. The amici argued mitigating circumstances, again despite the fact that the defendant chose not to present such at the hearing. The majority found the sentence appropriate.

Finally, in addition to the above authorities, at least one law review commentator has found the appointment of independent counsel the most appropriate course of action when a capital defendant refuses to present mitigation. *See* Linda Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death,* 55 Tenn. L. Rev. 95 (1987).

Conclusion

Society has a strong and compelling interest in a full and fair capital sentencing proceeding, regardless of the individual circumstances of a particular case. This interest requires the presentation of both aggravating and mitigating factors to the jury that will be deciding life or death. Without that information, the jury cannot perform its statutory function and make an informed, reliable decision. In this instance, Davis wishes to abrogate those requirements because of a desire to receive the death penalty. While these safeguards are intended to protect an individual defendant from an arbitrary and capricious execution, they serve an equally, if not more, important purpose in protecting society from participating in an execution that is not warranted. The jurors are not "potted plants" to be left in the dark by a headstrong defendant with a personal agenda, but rather are the representatives of a civilized society with the "awesome responsibility" of expressing the values and standards of that society in the most serious and final of all decisions. The law has set forth what is required for them to perform their duties, statutorily and morally. "The public has an interest in the reliability and integrity of a death sentencing decision that transcends the preferences of individual defendants." *State*

v. Martini, 144 N.J. 603, 677 A.2d 1106, 1107 (N.J. 1996). This Court perceives itself as constitutionally obliged to "police" these proceedings with "an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Strickland,* 466 U.S. at 704.

Therefore, IT IS ORDERED that attorney Laurie White is hereby appointed as independent counsel to represent the public interest in a full and fair penalty phase proceeding.

New Orleans, Louisiana, this 30 day of August, 2001.

HELEN G. BERRIGAN,

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30656

UNITED STATES OF AMERICA,

VERSUS

LEN DAVIS,

Defendant-Petitioner

Appeal from the United States District Court
for the Eastern District of Louisiana
94-CR-381-1-C

(Filed Apr. 5, 2002)

ORDER:

IT IS ORDERED that the motion of independent counsel, Laurie White, for Leave to file petition for panel rehearing and petition for rehearing en banc is GRANTED.

/s/ Robert M. Parker
Robert M. Parker
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30656

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

LEN DAVIS,

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 3/11/02, 5 Cir., ___, ___ F.3d ___)

(Filed Apr. 25, 2002)

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing filed by independent counsel, Laurie White is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing filed by independent counsel, Laurie White is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc by independent counsel, Laurie White is DENIED.

ENTERED FOR THE COURT:

/s/ Robert M. Parker
United States Circuit Judge

Supreme Court, U.S.
FILED
OCT 23 2002

No. 02-274

In the Supreme Court of the United States

LAURIE A. WHITE, INDEPENDENT COUNSEL,
PETITIONER

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
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QUESTION PRESENTED

Whether the district court's appointment of an independent counsel to investigate and present mitigation evidence during a federal capital sentencing proceeding violated the defendant's Sixth Amendment right to self-representation.

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In the Supreme Court of the United States

No. 02-274

LAURIE A. WHITE, INDEPENDENT COUNSEL,
PETITIONER

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion and order of the court of appeals (Pet. App. 1-38) is reported at 285 F.3d 378. The opinion of the district court (Pet. App. 39-62) is reported at 180 F. Supp. 2d 797.

JURISDICTION

The opinion and order of the court of appeals granting the writ of mandamus was entered on March 11, 2002. A petition for rehearing was denied on April 25, 2002 (Pet. App. 64-65). The petition for a writ of certiorari was filed on July 24, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, Len Davis was convicted of conspiracy against civil rights resulting in death, in violation of 18 U.S.C. 241, and deprivation of rights under color of law resulting in death, in violation of 18 U.S.C. 242. After a penalty phase hearing, Davis was sentenced to death. The court of appeals affirmed the conviction but remanded for resentencing. On remand, Davis informed the court that he desired to represent himself during the new penalty phase. After holding a hearing pursuant to *Faretta* v. *California*, 422 U.S. 806 (1975), the district court ordered standby counsel to assume full representation of Davis. On July 17, 2001, the court of appeals issued a writ of mandamus directing the district court to allow Davis to represent himself. On August 30, 2001, the district court entered an order appointing petitioner to serve as independent counsel during the penalty phase of Davis's trial for the purpose of investigating and presenting mitigation evidence. On March 11, 2002, the court of appeals issued a second writ of mandamus and remanded for a penalty phase without the assistance of independent counsel.

1. On October 13, 1994, Paul Hardy shot and killed Kim Groves at the behest of Davis, who was then an officer of the New Orleans Police Department, after Groves filed an internal affairs complaint alleging that Davis had engaged in police brutality. Damon Causey helped to plan the murder and the subsequent coverup. *United States* v. *Causey*, 185 F.3d 407, 411 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000).

On August 10, 1995, a federal grand jury returned a superseding indictment charging Davis, Hardy, and

Causey with one count of conspiracy against civil rights resulting in death, in violation of 18 U.S.C. 241; one count of deprivation of rights under color of law resulting in death, in violation of 18 U.S.C. 242; and one count of tampering with a witness by killing her to prevent the communication of information to a federal law enforcement officer, in violation of 18 U.S.C. 1512(a)(1)(C) and (a)(2). The government filed a notice of intent to seek the death penalty against Davis and Hardy but did not seek the death penalty against Causey, 185 F.3d at 411.

A petit jury found all three defendants guilty of the charges under 18 U.S.C. 241 and 242, and found Davis and Hardy guilty of the witness-tampering charge. After further capital sentencing proceedings against Davis and Hardy, the jury recommended a death sentence for each. The district court sentenced Davis and Hardy to three concurrent death sentences, and Causey to two concurrent terms of life imprisonment. *Causey*, 185 F.3d at 411-412.

The court of appeals affirmed the defendants' convictions under 18 U.S.C. 241 and 242, *Causey*, 185 F.3d at 413-416, but reversed Davis's and Hardy's convictions for witness tampering, *id.* at 421-423. The court also remanded Davis's and Hardy's cases for resentencing because the jury did not make separate recommendations concerning the appropriate penalty for each count of conviction. *Id.* at 423. This Court denied all three defendants' petitions for writs of certiorari. 530 U.S. 1277 (2000).

2. On remand, Davis moved to represent himself during the new penalty phase. After holding a hearing pursuant to *Faretta*, *supra*, the district court found that Davis had knowingly and intelligently elected to exercise his right of self-representation. The court con-

cluded, however, that the right of self-representation does not extend to criminal sentencing, and even if it does, that Davis's interests were outweighed by the Eighth Amendment requirement that the death penalty not be imposed arbitrarily and capriciously. The court directed standby counsel to assume full representation of Davis and to prepare and present a full penalty phase defense. Pet. App. 2.

On July 17, 2001, a divided panel of the court of appeals granted Davis's petition for a writ of mandamus directing the district court to allow Davis to represent himself in the penalty phase. Pet. App. 2; 7/17/01 Order 1-8. The majority held that Davis has a right under 28 U.S.C. 1654 and the Sixth Amendment to represent himself in the penalty phase of his capital trial and that, under the circumstances of this case, that right is not outweighed by the public's interest in avoiding arbitrary and capricious imposition of the death penalty. 7/17/01 Order 3-7. The court noted that the district court still had the authority to appoint standby counsel to assist Davis "if such is appropriate." *Id.* at 7-8.

Judge Dennis dissented from the issuance of the writ of mandamus. 7/17/01 Order 1-11 (Dennis, J., dissenting). He concluded that Davis's Sixth Amendment right to represent himself "is clearly outweighed by the interest of the people of the United States in the fair and efficient administration of justice in the imposition of federal capital punishment." *Id.* at 3-4.

3. On August 30, 2001, the district court issued an order appointing petitioner to serve as independent counsel during Davis's new penalty phase and directing her to "investigate and present mitigation evidence." Pet. App. 39-40. The court concluded that the involvement of independent counsel was necessary "to

accommodate" the public's "substantial independent interest in being assured of a full and fair sentencing proceeding." *Id.* at 40. The court acknowledged that the independent counsel would present mitigation evidence against Davis's wishes, but the court stated that the independent counsel "will be clearly identified as *not* representing Davis, and Davis will be permitted to present whatever defense he deems appropriate." *Ibid.*

4. On March 11, 2002, the same divided panel of the court of appeals issued a second writ of mandamus directing the district court to allow the penalty phase to proceed without the involvement of independent counsel. Pet. App. 1-38. The majority concluded that any "alleged inherent authority [of the district court] to appoint independent counsel" conflicts with Davis's Sixth Amendment right of self-representation. *Id.* at 9-10. The majority stated that Davis's right of self-representation "cannot be impinged merely because society, or a judge, may have a difference of opinion with the accused as to what type of evidence, if any, should be presented in a penalty trial." *Id.* at 10-11. The court noted that Davis's trial strategy—that of "attack[ing] the strength of the government's case as to his guilt" "instead of presenting traditional mitigating evidence"—"is in direct conflict with the independent counsel's approach." *Id.* at 11, 12.[1] After observing

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[1] The majority acknowledged that, although Davis's brief suggests that he intends to rely on that "residual doubt" theory during the penalty phase, he has also threatened "on various occasions" that he will not present any evidence at all. Pet. App. 11 n.6. The court further noted that "[t]here is also evidence in the record that Davis would prefer the death penalty to be imposed," not because he is on a "suicide mission," but because he believes that "his legal arguments concerning sufficiency of the evidence will be scrutinized more closely on appeal" if he is under sentence of

that "Davis' right to self-representation encompasses the right to direct trial strategy," the court of appeals held that "the district court's decision to impose an independent counsel into these proceedings [must be] overturned." *Ibid.*

Judge Dennis again dissented. Pet. App. 14-38. He contended that the majority committed "legal error in this case of first impression." *Id.* at 15. In his view, Davis was not deprived of a constitutional right of self-representation by the district court's appointment of an independent counsel "to represent [a] national interest" "in the fair and faithful administration of justice." *Id.* at 38.

ARGUMENT

1. Petitioner seeks (Pet. 10-30) this Court's review of the court of appeals' order reversing the district court's appointment of independent counsel for the purpose of presenting mitigation evidence during the penalty phase of Davis's trial. This case, however, would provide a poor vehicle for review of the question presented, because petitioner lacks standing to challenge the decision below, and, in any event, petitioner's claims are not ripe for review by this Court.

a. Petitioner argues that the decision below is contrary to "the Eighth Amendment right prohibiting the imposition of arbitrary and capricious sentences[] and the generalized societal concern against wrongfully sentencing someone to death." Pet. 24. Petitioner lacks

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death. *Ibid.* The court concluded that "[w]hatever the merits of Davis's legal strategy, * * * Davis has the right to conduct his penalty defense in the manner of his choosing"—even if it includes "arguing to the jury that he should receive the death penalty"—because, ultimately, "it is he who suffers the consequences if his defense fails." *Id.* at 12 n.6 (quoting *Faretta*, 422 U.S. at 820).

standing to raise either of those claims. Petitioner cannot assert the Eighth Amendment rights of Davis, the real party in interest, because there is no indication in the record that Davis is "unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." *Whitmore* v. *Arkansas*, 495 U.S. 149, 162-166 (1990); see *Gilmore* v. *Utah*, 429 U.S. 1012 (1976). Further, the "generalized" interest of the public in reliable sentencing proceedings is insufficient to give her standing to challenge the court of appeals' decision. *Whitmore*, 495 U.S. at 160 ("public interest [in] protections of the Eighth Amendment" did not give inmate "a right to invoke this Court's jurisdiction to insure that an execution [of another prisoner] [wa]s not carried out * * * without appellate review"); see also *Allen* v. *Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

b. This Court's review of the question presented would also be premature. The court of appeals vacated the judgment against Davis in part and remanded the case to the district court for a new sentencing proceeding. Davis has not yet been resentenced and it is far from certain that he will be sentenced to death. *Whitmore*, 495 U.S. at 159-160 ("It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case."). This Court generally does not review judgments in the courts of appeals when further proceedings are taking place in the same case in the lower courts, and the issue raised in the petition can be raised after conclusion of those proceedings. Robert Stern et al., *Supreme Court Practice* § 4.18, at 196 & n.60 (7th ed. 1993); *Hamilton-*

Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-259 (1916). That general practice enables the Court to examine cases on a full record, prevents unnecessary delays in the trial and appeals process, and allows the Court to consider all of the issues raised by a single case or controversy at one time.

The prudential reasons for following that course are particularly compelling in this case. If Davis is sentenced to life imprisonment, petitioner's concerns about the imposition of the death penalty will be moot. *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). If Davis is sentenced to death, the court of appeals and this Court can, as appropriate, consider the questions presented in the instant petition as well as other potential issues, following final judgment. *Ibid.*; see *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973) (previous denial of certiorari does not bar later review). Indeed, although petitioner asserts that this case presents the question whether a defendant may "actively seek a death sentence" or "demand a sentence of death," Pet. 10, 25, petitioner has not yet presented a defense, and there is some evidence in the record to suggest that petitioner may rely on a "residual doubt" theory in his defense during the penalty phase. See note 1, *supra*.

2. In any event, the court of appeals correctly concluded that "[a]n individual's constitutional right to represent himself * * * outweighs an individual judge's limited discretion to appoint amicus counsel when that appointment will yield a presentation to the jury that directly contradicts the approach undertaken by the defendant." Pet. App. 4-5. In *Faretta* v. *California*, 422 U.S. 806, 832-834 (1975), the Court held that the Sixth Amendment guarantees a defendant the

right to forgo counsel and conduct his own defense. Because a defendant who represents himself "relinquishes * * * many of the traditional benefits associated with the right to counsel," a defendant seeking to proceed pro se "must 'knowingly and intelligently'" waive that right. *Id.* at 835 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938)). Furthermore, a defendant's "technical legal knowledge" is "not relevant" to the determination whether a defendant is competent to waive his right to counsel, *id.* at 836, and, although a defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored," *id.* at 834; see *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (observing that "the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant").

There is no basis for declining to apply the right recognized in *Faretta* in the sentencing phase of a capital case. "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder." *Monge* v. *California*, 524 U.S. 721, 732 (1998). Although this Court has never squarely addressed the question whether *Faretta* applies in the sentencing phase of a capital case, it has denied a request for a stay of execution in at least one case in which the defendant represented himself during the penalty phase. *Lenhard* v. *Wolff*, 444 U.S. 807 (1979). Several other courts have expressly held that *Faretta* applies in capital sentencing proceedings. See, *e.g.*, *Silagy* v. *Peters*, 905 F.2d 986, 1006-1008 (7th Cir. 1990), cert. denied, 498 U.S. 1110 (1991); *Illinois* v. *Coleman*, 660 N.E.2d 919, 937-

938 (Ill. 1995), cert. denied, 519 U.S. 827 (1996); *Sherwood* v. *Indiana*, 717 N.E.2d 131, 135 (Ind. 1999); *South Carolina* v. *Brewer*, 492 S.E.2d 97, 99 (S.C. 1997); *Bishop* v. *Nevada*, 597 P.2d 273, 276 (Nev. 1979).

Under those principles, the court of appeals correctly held that the district court's appointment of an independent counsel violated Davis's Sixth Amendment right to self-representation during the penalty phase of his trial. "[T]he core of the *Faretta* right" is the right "to preserve actual control over the case he chooses to present to the jury." *McKaskle* v. *Wiggins*, 465 U.S. at 178. Thus, that right is violated by the appointment of counsel whose "participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions * * * or to speak *instead* of the defendant on any matter of importance." *Ibid.* Davis's right of self-representation thus encompasses the right to make the "specific tactical decision" whether to introduce mitigating evidence. Pet. App. 11; accord *Silagy*, 905 F.2d at 1007-1008 (holding *Faretta* right applies to decision not to present mitigating evidence); *Bishop* v. *Nevada*, 597 P.2d at 276 (same). Accordingly, the Sixth Amendment barred the district court's appointment of counsel to present mitigation evidence "in direct conflict" with "Davis's strategy" not to do so. *Id.* at 12.

Petitioner errs in asserting (Pet. 22-25) that the court of appeals' decision conflicts with the interests protected by the Eighth Amendment in fair and reliable capital sentencing proceedings. The Eighth Amendment guarantees the defendant the *opportunity* to present mitigation evidence for the jury's consideration. *E.g.*, *Saffle* v. *Parks*, 494 U.S. 484, 490 (1990); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson* v. *North Carolina*, 428 U.S. 280, 303-

305 (1976) (plurality opinion). The court of appeals' decision in this case neither deprives Davis of the opportunity to present mitigation evidence nor prevents the jury from considering any relevant mitigating factors based on the evidence presented by the parties during the guilt phase or in the forthcoming sentencing proceeding.

3. Petitioner argues that review of the decision below is warranted because it "is irreconcilably in conflict with this Court's decisions, with federal statutes, and with decisions of the United States Court of Appeals for the Seventh Circuit." Pet. 10. None of those contentions has merit.

a. Contrary to petitioner's assertion (Pet. 10-13), the court of appeals' decision does not conflict with *United States* v. *Nixon*, 418 U.S. 683, 709 (1974); *Herring* v. *New York*, 422 U.S. 853, 862 (1975); *Gardner* v. *Florida*, 430 U.S. 349, 360 (1977) (plurality opinion); *Lankford* v. *Idaho*, 500 U.S. 110, 127 (1991); *Quercia* v. *United States*, 289 U.S. 466, 469 (1933); and *United States* v. *Hasting*, 461 U.S. 499, 505-506 (1983). Although *Herring*, *Gardner*, and *Lankford* stress the importance of the adversarial process, and *Hasting* and *Quercia* recognize the federal courts' limited supervisory powers, none of those decisions involves the question whether or under what circumstances a district court has authority to appoint independent counsel during the penalty phase of a capital case. Accordingly, none warrants this Court's review of the court of appeals' decision on that issue.

b. Petitioner is also wrong is asserting (Pet. 13-17) that the court of appeals' decision conflicts with the Federal Death Penalty Act of 1994 (FDPA), which provides that upon a finding of guilt in a capital case the district court must "conduct a separate sentencing

hearing to determine the punishment to be imposed," 18 U.S.C. 3593(b), and further provides that during such hearing the defendant "*may* present any information relevant to a mitigating factor" and the prosecution "*may* present any information relevant to an aggravating factor." 18 U.S.C. 3593(c) (emphases added). Nothing in those provisions requires the parties to present evidence relevant to aggravating and mitigating factors in every case. A fortiori, the FDPA cannot fairly be read to authorize or mandate the appointment of independent counsel for the purpose of presenting mitigating evidence when the defense elects not to do so.

Petitioner similarly errs in relying (Pet. 14-15) on decisions recognizing the authority of the federal courts to appoint counsel to defend a legal position that none of the parties to a case will urge. In this case, the district court did not appoint independent counsel to adopt and present a legal position that neither party intends to defend. Rather, the court adopted counsel for the express purpose of adopting a trial strategy that directly conflicts with Davis's strategy. Pet. App. 12. None of the cases identified by petitioner involves the appointment of counsel for the purpose of altering or supplementing the presentation of evidence to the jury by a party who has asserted his constitutional right to self-representation, and none supports further review.[2]

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[2] Nor do the presentence report requirement applicable in non-capital cases or Rule 706 of the Federal Rules of Evidence warrant further review, as petitioner contends. Pet. 15-16. The FDPA specifically provides that "no presentence report shall be prepared" in conjunction with a federal capital sentencing proceeding. 18 U.S.C. 3593(c). Rule 706 authorizes a district court to appoint expert witnesses, not attorneys or advocates.

c. Petitioner also argues (Pet. 17-19) that the court of appeals' decision conflicts with *United States* v. *Taylor*, 569 F.2d 448 (7th Cir. 1978). That contention is incorrect. In *Taylor*, the Seventh Circuit held that the district court did not violate the defendant's right of self-representation by allowing standby counsel, over the defendant's objection, to cross-examine witnesses, make objections, and deliver a closing argument. 569 F.2d at 452-454. The *Taylor* court stressed, however, that its holding was limited to the "peculiar circumstances of th[at] case," which involved a defendant who "openly acknowledged his inability defend himself" and refused "to take [any] part in the proceedings." *Id.* at 453. The court also observed that "appointed counsel's participation in the trial did not in any manner impinge upon or undercut the defense." *Ibid.* By contrast, the court of appeals found that "Davis's strategy is in direct conflict with the independent counsel's approach." Pet. App. 12.

In any event, *Taylor* was decided before this Court's decision in *McKaskle*, *supra*, which holds that a district court may not allow standby counsel to override a *pro se* defendant's strategic choices. 465 U.S. at 178. *Taylor* also was not a capital case, and it did not involve the appointment of independent counsel. The court of appeals in the instant case has already authorized the district court to appoint standby counsel in the penalty phase. Pet. App. 3. Accordingly, *Taylor* provides no basis for further review of whether or when the appointment of independent counsel in a federal capital sentencing hearing is appropriate.

d. The state court cases relied on by petitioner (Pet. 26, 29) likewise do not conflict with the decision below. In *Washington* v. *Dodd*, 838 P.2d 86 (Wash. 1992) (en banc), the court addressed a defendant's right to waive

appellate review of a death sentence. The court did not address the question presented.

In *New Jersey* v. *Koedatich*, 548 A.2d 939, 993-995 (N.J. 1988), cert denied, 488 U.S. 1017 (1989), the court held that, even when a represented defendant directs his counsel not to introduce mitigating evidence in a capital sentencing hearing, the court should ensure that mitigating evidence is presented. While the court quoted proposed ways to address this problem, including having the trial court itself call witnesses with mitigating evidence or appointing counsel to call them, the court did not "adopt or reject any of them," or "foreclose the possibility that * * * the trial court may have to compel defense counsel to present the mitigating evidence despite a client's instructions to the contrary." *Id.* at 997. The court did not specifically address any issue of a defendant's rights under *Faretta*.

In *Muhammad* v. *Florida*, 782 So. 2d 343, 363-364 (Fla.), cert. denied, 122 S. Ct. 323 (2001), the court held, as a matter of state law, that the sentencing judge had erred in placing great weight on the verdict of the advisory jury, because the defendant (who was representing himself) had refused to put on mitigating evidence. The court then discussed "prospective procedures" that should apply on re-sentencing, including possible appointment of counsel to present mitigating evidence, if the defendant again refused to put on mitigating evidence. *Id.* at 364. The defendant did not raise any claim that such an appointment of counsel would conflict with his assertion of his right to self-representation, and the court did not address any such claim. The same is true in *Klokoc* v. *State*, 589 So. 2d 219 (Fla. 1991), where special counsel was appointed to present mitigating evidence after the defendant instructed his counsel not to do so. Although *Klokoc* also

sought to waive his appeal, the court reduced the death sentence to life imprisonment because of the mitigating circumstances; it did not address any claim under *Faretta*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2002

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No. 02-274

IN THE SUPREME COURT OF THE UNITED STATES

LAURIE A. WHITE, INDEPENDENT COUNSEL,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

and

LEN DAVIS

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING PETITION FOR WRIT OF CERTIORARI SUBMITTED BY LAURIE A. WHITE, INDEPENDENT COUNSEL

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The National Association of Criminal Defense Lawyers (NACDL) respectfully moves this Honorable Court pursuant to United States Supreme Court Rule 37 for leave to file the accompanying brief *amicus curiae* in support of Petitioner, Appointed Independent Counsel. This motion is necessary because, although the Solicitor General and Independent Counsel have consented in writing to the filing of this brief, standby counsel for Mr. Len Davis has not responded to NACDL's attempts to obtain Mr. Davis' consent.

In support, NACDL states:

1. NACDL is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

2. In this case, the defendant has chosen, pursuant to

Faretta v. California, 422 U.S. 806 (1975), to represent himself during the Federal Death Penalty Act (FDPA) sentencing hearing. *See* 18 U.S.C. § 3591 *et seq.* Further, the defendant has stated that he will not introduce mitigation evidence and that he affirmatively seeks a death verdict at the trial court level.

3. The appointment of an independent counsel to present mitigation evidence in these circumstances implicates both the Sixth Amendment rights of criminal defendants as and the public's interest in the fair, efficient, and consistent administration of the federal capital punishment system in accord with the Eighth Amendment.

4. Moreover, the defendant in this case, Len Davis, actively seeks a sentence of death from the district court and therefore he joins the United States in opposing the district court's order appointing independent counsel. Therefore, the normal mechanism by which the defense perspective is

presented to this Court in a criminal case does not exist. In addition, NACDL participated below by filing a brief *amicus curiae* in the Fifth Circuit which was quoted by the dissent.

5. NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. NACDL is dedicated to the preservation and improvement of our adversary system of justice. Thus, the members of NACDL have a vital interest in ensuring that the integrity of the criminal justice system is protected.

6. The United States, through the Office of the Solicitor General and Appointed Independent Counsel Laurie White have indicated that they do not oppose NACDL's filing of an *amicus curiae* brief in this case. NACDL has contacted standby counsel for Len Davis but has received no response as yet.

We ask leave to file our *amicus curiae* brief in the belief that it may assist the Court.

Respectfully Submitted,

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THIS IS A CAPITAL CASE

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BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING PETITION

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation which currently has a membership exceeding 10,000 attorneys with an additional 28,000 affiliate members in fifty states.[1] The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the House of Delegates. NACDL was founded forty years ago to promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. A

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[1] Pursuant to S.Ct. Rule 37.6, counsel certifies that no counsel for party authored any part of this brief. No person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief.

Pursuant to S.Ct. Rule 29.6 on Corporate Disclosure Statements, NACDL is a nonprofit corporation. It has no parent corporation, and it is not a publicly held corporation, nor does a publicly held company own 10% or more of its stock.

cornerstone of this organization's objectives is the preservation of defendants' fundamental constitutional right to counsel as provided by the Sixth Amendment. Similarly, NACDL has strong interests in the vindication of the Eighth Amendment's ban on cruel and unusual punishment. NACDL is concerned about any case that impacts these constitutional rights. NACDL believes that the issues discussed in this case are of such profound importance to criminal defendants, defense lawyers and the administration of criminal justice throughout the nation that NACDL should offer its assistance to the Court.

SUMMARY OF ARGUMENT

The issue in this case is whether, in the circumstances present here, the district court's appointment of an independent counsel to present mitigation evidence and challenge the government's aggravating circumstances during capital sentencing proceedings unconstitutionally interferes with a criminal defendant's right to represent himself. Both parties in this case seek the same outcome from the district court -- a sentence of death. Accordingly, at the district court level, there is a breakdown in the adversary process. This breakdown occurs in the context of a capital sentencing

proceeding, where the Eighth Amendment requires both consistency and a heightened degree of accuracy, and where the specific statutory procedures of the Federal Death Penalty Act (FDPA) apply. Although very concerned with any course that might undermine a defendant's fundamental constitutional right of self-representation, given this narrow and unique combination of circumstances, NACDL believes that as long as Mr. Davis is given full control over his case, the district court's appointment of an independent counsel to present mitigation evidence and challenge aggravating evidence does not infringe on his *Faretta* rights.

ARGUMENT

Unquestionably, a criminal defendant has the fundamental constitutional right to represent himself. *See Faretta v. California*, 422 U.S. 806 (1975). The Fifth Circuit's opinion in this case correctly recognizes this right,[2] but fails to similarly recognize the

[2]It appears that in this case the district court intends to fully honor that right as well. "This Court . . . will . . . allow Davis full rein in his penalty phase. He may voir dire jurors, make an opening statement, question witnesses, call witnesses, introduce evidence, make objections and present a closing argument, all as he desires to do nor not do . . .". Order at 6.

Eighth Amendment's ban on the arbitrary and capricious imposition of the death penalty. As Judge Dennis states in dissent,

> As constitutional scholars have observed, "Whenever possible, conflicting [constitutional] provisions should be reconciled and construed so as to give effect to both." The Supreme Court has consistently refused to assign priority among the safeguards enumerated in the Bill of Rights. This case presents a conflict between self-representation and Eighth Amendment interests. The district court's reconciliation of these constitutionally protected interests is manifestly reasonable--so much so that it calls to mind Justice Clark's admonition that "there is no war between the Constitution and common sense."

285 F.3d at 392-93 (citations omitted).

Petitioner's decision to actively seek a death verdict at the district court level creates a breakdown in the adversary process.[3] In the unique context of a capital sentencing hearing, this breakdown in the adversary system creates the risk that the death penalty will be imposed in an unconstitutionally arbitrary and capricious manner.

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[3] *See infra* n.5.

I. The possibility of death implicates Eighth Amendment concerns which create a special need for accuracy and consistency.

There is no question but that "death is different." *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991). As a penalty, death is unique in its severity and irrevocability. *Furman v. Georgia*, 408 U.S. 238, 286-291 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring). As this Court succinctly stated in *Woodson v. North Carolina*, 428 U.S. 280 (1976):

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of a only a year or two.

Id. at 305.

Because "death is different," the Eighth Amendment requires that the procedures used for determining whether death is an appropriate punishment be especially reliable so that death is not imposed "in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 313 (1972). "Because of th[e] qualitative difference [between the death penalty and a life sentence], there is a corresponding difference

in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U.S. at 305. Thus, in *Gregg*, the Court held that,

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Id. at 189.

The Fifth Circuit Opinion incorrectly ignores entirely the Eighth Amendment concerns present in the context of this case. The Fifth Circuit observes

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *422 U.S. at 834* (quoting *Illinois v. Allen, 397 U.S. 337, 350-51, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970)* (Brennan, J., concurring)).

285 F.3d at 384.

Unfortunately, this observation ignores the difference

between the sentencing phase of a capital case on the one hand, and either the trial of a non-capital case or the culpability phase of a capital trial. At the trial of a non-capital case or the culpability phase of a capital trial a defendant may choose to plead guilty to the charge. A defendant may not, however, "plead guilty" to the death penalty.[4] This distinction is based upon Eighth Amendment concerns and society's interest in the accurate and fair imposition of the death penalty. As Judge Dennis noted:

> In the words of Justice Thurgood Marshall, "[a] defendant's voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice." *Whitmore v. Arkansas, 495 U.S. 149, 173, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990)* (Marshall, J., dissenting). Consequently, cases such as the one before us do not involve a capital defendant's so-called "right to die." When a capital defendant seeks to circumvent procedures necessary to ensure the propriety of his conviction and sentence, he does not ask the State to permit him to take his own life. Rather, he invites the State to violate two of the most basic norms of a civilized society--that the State's penal authority be invoked only where necessary to serve the ends of justice, not the ends of a particular

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[4] The FDPA requires a special hearing to determine whether a sentence of death is justified, and this hearing cannot be waived by the defendant. *See* 18 U.S.C. § 3593; *see also infra* Section III

> individual, and that punishment be imposed only where the State has adequate assurance that the punishment is justified. The Constitution forbids the State to accept that invitation.

285 F.3d at 397.

Therefore, in the sentencing phase of a capital trial it is simply not true that the defendant is the only one who bears the consequences of the outcome, as postulated by *Faretta*. If that were true, then the defendant would be able to "plead guilty" to the death penalty. However, a defendant may not "plead guilty" to the death penalty because Eighth Amendment considerations mean that the entire society has a strong interest in ensuring that this most severe and permanent form of punishment is imposed in a fair, accurate, reliable and consistent manner.

For a just system of punishment, the procedures used must promise both accuracy within cases and consistency among cases. First, justice demands that the sentence imposed in the individual case be arrived at in a manner that assures its correctness. Thus, the Court has required that the procedures used to impose capital punishment "ensure 'reliability in the determination that death is the

appropriate punishment in a specific case . . ." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (quoting *Woodson*, 428 U.S. at 305). Second, for both public confidence in the system and in fairness to the class of defendants facing this extreme punishment, the procedures utilized must also achieve consistency across the spectrum of cases. "[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Gregg*, 428 U.S. at 188 (citing *Furman*, 408 U.S. at 309-10). Thus, the Court has insisted that "that capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings*, 455 U.S. at 112.

II. An essential component of the Eighth Amendment's bar on cruel and unusual punishment is the jury's consideration of a life sentence.

In capital sentencing proceedings, a reliable determination of sentence depends upon the jury's ability to fairly consider the possibility of life. For this reason, this Court's Eighth Amendment jurisprudence has focused on the presentation of mitigating evidence in order to insure that the jury adequately considers a sentence of life.

Thus, the Court has said that the jury must "consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime." *Penry*, 492 U.S. at 328. As this Court stated in *Eddings*, 455 U.S. at 112, this requirement is an obvious corollary to the concern that there be a just consistency among cases: "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency." In *Gregg*, the Court stressed the traditional importance of this feature in any sentencing scheme:

> It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. We have long recognized that '[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'

Id. at 188 (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) (other citations omitted) . Again in *Woodson*, this Court emphasized the importance of this traditional requirement, particularly in a capital case:

> This Court has previously recognized that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and there be taken into account the circumstances of the offense together with the character and propensities of the offender." Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence . . . "[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . *requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.*"

428 U.S. at 304 (emphasis added). Thus, the consideration of mitigating evidence is not an end in itself. It is the mechanism that insures that the jury adequately considers a life sentence, so that the death penalty is not imposed in an arbitrary or capricious manner.

III. Consideration of mitigating evidence through the adversary system is an essential component of the mechanism by which the FDPA satisfies the Eighth Amendment's mandate that the sentencer fairly adequately consider life.

The Federal Death Penalty Act sets forth specific procedures for realizing the substantive constitutional aim that a life sentence be considered. These procedures include the requirement of a "special

hearing to determine whether a sentence of death is justified." 18 U.S.C. § 3593. At this "special hearing," consistent with the dictates of the Supreme Court, the jury must be permitted to consider any mitigating circumstance. Notably, this "special hearing" is mandatory and cannot be waived:

> If the attorney for the government has filed a notice [seeking the death penalty] as required under subsection (a) and the defendant is found guilty of or pleads guilty to an offense describe in section 3591, the judge . . . *shall* conduct a separate sentencing hearing to determine the punishment to be imposed.

18 U.S.C. § 3593 (b) (emphasis added). Therefore, a defendant who has been found guilty in a capital case may not "plead guilty" to the death penalty. Further, the FDPA sentencing scheme clearly contemplates that the manner in which the mandatory procedures will occur is through the consideration of mitigating evidence via the adversary system. Under normal circumstances, then, the defendant presents the mitigating circumstances which allows the decision-maker to consider a life sentence. Thus, under the FDPA, consideration of mitigating evidence through the adversary process is crucial to the overall goal that capital sentencing not occur in an

arbitrary and capricious manner.

Indeed, the adversary process is deeply ingrained in our justice system as a requirement for fair verdicts. As the Supreme Court has explained:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts within the framework of the rules of evidence.

United States v. Nixon, 418 U.S. 683, 709 (1974). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975).[5]

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[5] *See also Carroll v. President and Commissioner of Princess Anne*, 393 U.S. 175, 183 (1968) (criticizing one-sided proceedings because "the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding . . ."). Indeed, the judicial system's need for adversaries is deemed so crucial to the attainment of accurate and just results that, in the absence of true adversaries, the federal courts will not hear a case. *See United States Parole Commission v. Geraghty*, 445 U.S. 388, 395-96 (quoting *Flast v.*

In fact, in *Gardner v. Florida*, 430 U.S. 349 (1976), the Supreme Court reversed a death sentence that was imposed on the basis of one-sided information that had not been subjected to debate through the adversarial process. Thus, the Court held:

> [T]he argument rests on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief [is] that debate between adversaries is often essential to the truth-seeking function of trials[.]

Gardner, 430 U.S. at 360.

IV. The adversary system disintegrates when neither party advocates for life.

In this case, Petitioner's decision to actively seek a death verdict at the trial level causes the adversary system to disintegrate.[6]

Cohen, 392 U.S. 83, 95 (1968) (Article III of the Constitution limits the business of federal courts to 'questions presented in an adversary context . . ."); *Dailey and Collie v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir. 1998) ("federal courts may only address questions presented in an adversary context . . .").

[6] The Fifth Circuit Opinion incorrectly suggests the trial court cannot appoint independent counsel because Davis has made a "strategic" decision simply to attack the strength of the government's case as to his guilt. *See* 285 F.3d at 384-85 & n.6 and accompanying text. This suggests that Mr. Davis has a "strategy" on how to make the case for life sentence before the trial jury. The district court, however, found that Mr. Davis actively seeks a death verdict at the trial level and the Fifth Circuit concedes that there is evidence in the record that supports this finding. *Id.* Moreover, as Judge Dennis notes, in Mr. Davis' original brief in the Fifth Circuit he states,

Neither party will contest aggravating circumstances.[7] Neither party will present or identify mitigating circumstances.[8] And neither party

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> Mr. Davis believes that the[] legal issues [he plans to raise in a motion fo new trial and/or Rule 2255 motion] will of necessity have to be viewed much more closely by the district and appellate courts if he is facing a death sentence, than they would if he were facing a life sentence. While he has no desire to die he has weighed carefully the prospects of a death sentence against spending the rest of his his life in jail - and he finds life in prison to be more onerous. Believing that legal errors that led to his conviction will be examined more scrupulously if he has a death sentence facing him, Mr. Davis made the strategic decision that he does not want to put on mitigating evidence in an effort to convince the jury that he should not die . . .

285 F.3d at 389 n.23 (Dennis, J. dissenting). Thus, it is clear that Mr. Davis does not intend to present any case for life to the sentencing jury and actively seeks a death verdict from that body. Accordingly, the Fifth Circuit's reliance on "trial strategy" as a justification for overruling the district court is unfounded.

[7] *Cf. Bell v. Cone*, __ U.S. __, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (noting the difference in kind rather than degree where the defense "entirely fails to subject the prosecution's case to meaningful adversarial testing" rather than failing to "do so at specific points.") When, as here, the adversarial system fails entirely, the judiciary can have no faith in the outcome. This is not, as discussed below, a case where the defense has "strategically" chosen to contest specific points in the prosecution's case, but rather one in which the adversarial process "entirely fails."

[8] The opinion below incorrectly asserts that the district court "wants the jury to have a complete picture of all possible traditional mitigating factors." Opinion at 384. The district court simply appointed independent counsel to insure that the existence of mitigating evidence is investigated, that its presentation to the jury is effectively contemplated, and that the case for life be presented.

will ask the jury to consider a sentence of life.[9]

The district court judge, Judge Dennis, and Independent Counsel cite an impressive body of case law establishing a federal court's authority to appoint amicus counsel to preserve the adversarial nature of the proceedings. *See* 285 F.3d at 394-95 & n. 52 (citing *United States v. Davis II*, 180 F. Supp. at 799) (other citations omitted); *Independent Counsel's Petition For Writ of Certiorari*, Section I.B. at 13-17. Indeed, as Judge Dennis states, this Court appears to have explicitly recognized this authority by stating in *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.7 (1984), "A pro se defendant must generally accept any unsolicited help or hindrance that may come from . . . an amicus counsel appointed to assist the court." Similarly, *Faretta* itself appears to leave open the possibility of the appointment of an amicus counsel. *See Faretta*, 422 U.S. at 846 n.7 (Burger, C.J., dissenting) ("Some of the damage we can anticipate from a defendant's ill-advised insistence on conducting his own defense may be mitigated by appointing a qualified lawyer to sit

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[9] For this reason, it makes no difference *why* Mr. Davis joins the government in seeking a death verdict. All that matters is that there is no one asking the jury to consider life.

in the case as the traditional 'friend of the court.' The Court does not foreclose this option.")

The Fifth Circuit's opinion unpersuasively attempts to dismiss all of this authority in three short sentences.[10] The Fifth Circuit's opinion does not explain precisely why this authority is not "remotely analogous" and "of limited precedential value." As Judge Dennis adroitly points out, the lack of case law in the specific circumstances of the penalty phase of a federal directly trial is not surprising given that prior to 2001 the federal government had not executed a civilian since 1963. Accordingly, any decision will necessarily have to rely on authority based upon differing factual scenarios. Moreover, as Judge Dennis also explains, *see* 285 F.3d at 394, because of separation of powers concerns, the opinion's reliance on cases where the appointment of a special prosecutor was rejected is much further afield than the cases supporting a federal court's authority to appoint amicus counsel.

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[10] 285 F.3d at 382 ("We closely scrutinized the "amicus curiae" cases. None are remotely analogous to the situation in the instant case. Therefore, we deem these cases to be of limited precedential value.")

In this regard, the Fifth Circuit's opinion is even more curious given that it also completely ignores the substantial state court authority supporting the appointment of an independent counsel in similar, if not identical circumstances. *See* 285 F.3d at 395-96 (Dennis, J. dissenting) (citing *Muhammed v. State*, 782 So.2d 343 (Fla. 2001); *State v. Koedatich*, 548 A.2d 939, 992 (N.J. 1988), *Morrison v. State*, 373 S.E.2d 506, 509 (Ga. 1988), *Klokoc v. State*, 589 So.2d 219 (Fla. 1991)).

Without appointed counsel, the jury is left with no guidance on how and in what manner, if at all, to consider life. This is distinctly different from a situation where the defendant wants the jury to consider life, but for strategic reasons, chooses not to present mitigating evidence.[11] In that situation, the jury still has a mechanism

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[11] The Courts have repeatedly recognized that,"[w]here counsel has neglected to conduct a proper investigation into mitigating circumstances, the failure to introduce mitigating evidence cannot be attributed to strategy." *People v. Ruiz*, 686 N.E.2d 574, 582 (Ill. 1997) (citing *People v. Coleman*, 660 N.E.2d 919 (Ill. 1995); *Baxter v. Thomas*, 45 F.3d 1501, 1514 (11th Cir. 1995) (a "strategic" decision cannot be reasonable when counsel has failed to investigate his options and make a reasonable choice between them). *See also Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991)("Case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."), *cert. denied*, 503 U.S. 952 (1992).

whereby life can be considered.[12] Moreover, because there is no one to investigate, and if appropriate, challenge the government's aggravating circumstances, there is no meaningful way for the jury to assess the validity and significance of the government's case.

Mr. Davis has the absolute right to represent himself and pursue whatever course he deems appropriate. That is his right under *Faretta*. Mr. Davis' apparent decision to join the government in seeking a death verdict, however, creates the risk that the death penalty will be imposed outside constitutional and statutory bounds; i.e. it will be imposed arbitrarily and unreliably because the jury will have no way to fairly consider a life sentence. In these unique circumstances, as long as Mr. Davis is given full control over his case, the district court's appointment of independent counsel to present mitigating evidence does not infringe on his *Faretta* rights.

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[12] It also must be noted that Mr. Davis's strategy – to be sentenced to death in order to increase the scrutiny of his appeal on the merits of the liability phase – is not one that would be recognized as valid if proffered by an attorney. Indeed, it would constitute ineffective assistance. Thus, the deliberate sabotage of his penalty phase defense, in a manner that would not be countenanced if performed by an attorney, places Mr. Davis's case in a vastly different context than other situations in which defendants exercise their constitutional right to proceed *pro se*.

CONCLUSION

Although ultimately Mr. Davis may not want to die, nevertheless, for whatever reason, the fact of the matter is that he presently wants the trial jury to impose the death penalty. Accordingly, at the district court level, there are not two adversaries arguing for different outcomes. Under these rare and unique circumstances, the district court indeed possesses the discretion to appoint *amicus* counsel to present mitigating factors to the jury so that the truth-seeking function of the adversary process is not circumvented and to assure that the death penalty is considered only where a life sentence is also fairly considered. Accordingly, the district court's order appointing *amicus* counsel should be affirmed.

Respectfully submitted,

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